IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-9061

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,
Petitioner

v.

E. A. SCHLECHT, et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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December 24, 1975

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

The petitioner Thomas J. Walsh, Jr., dba Tom Walsh & Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Oregon entered in this

proceeding on October 2, 1975.[1]

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011. It also appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

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[1]A single judgment and opinion was rendered by the Supreme Court of Oregon in five consolidated cases. The respondents are all of the trustees (plaintiffs below) in each of the five cases. Plaintiff was the sole defendant below in each of the cases.

QUESTION PRESENTED

Does a Subcontractors Clause in a labor agreement, as applied to require a signatory employer to pay trust fund contributions on behalf of employees of a non-union subcontractor who does not contribute to the trusts, violate § 302 of the Labor-Management-Relations Act of 1947 (29 USC § 186), which prohibits employer contributions to trust funds unless they are established for the sole and exclusive benefit of employees (and certain relatives) of the contributing employer and employees (and certain relatives) "of other employers making similar payments?"

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to

employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective dates; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers ... to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value ----------

(1) to any representative of any of his employees who are employed in an industry affecting commere;

....

(c) The provisions of this section shall not be applicable ... (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive

benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer ... ;

(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds;....

STATEMENT OF THE CASE

Petitioner, a builder of multiple unit housing, became the general partner in a limited partnership organized to construct, own and operate a 56-unit, low income housing project known as Oak Hill, in Salem, Oregon (Tr 17-21, 112; Pl. Ex. 3). The project was built under a subsidized rental program administered by the U.S. Dept. of Housing and Urban Development (HUD).

The limited partnership acted as its own general contractor on the Oak Hill project. The carpentry work of framing the buildings was subcontracted to Lloyd Jackson, a non-union employer, for a fixed price (Tr 24-25; D. Ex. B).

Petitioner is a signatory to a 1969 Memorandum Agreement (P. Ex. 1) binding him, as an employer, to the terms of the Carpenters Master Labor Agreement and to those of the five Trust Agreements referred to therein (P. Ex. 4, 7). These agreements require signatory employers to pay into five separate trust funds a total of 96¢ per hour of work by carpenter employees (P. Ex. 7, 8). Three of the trust funds provide direct benefits to workmen (the health and welfare, pension and vacation funds), while two of the funds benefit the industry generally

(apprenticeship and construction industry advancement funds).

The applicable Carpenters Master Labor Agreement (P. Ex. 7) contained in Article IV a Subcontractors Clause providing:

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement. ...."

Agreements with HUD required that workmen on the Oak Hill project be paid the prevailing "wages," including the cost of fringe benefits, as provided in the

Davis-Bacon Act, 40 USC § 276a (Tr 26). Petitioner's carpentry subcontractor Jackson was not a signatory to any labor agreement or other agreement providing for him to pay contributions to the carpenter's trust funds. Accordingly, Jackson did not make contributions for his employees to these trust funds (Tr 122). It is stipulated that Jackson, instead, paid directly to his carpenter employees on the Oak Hill job an additional amount of 96¢ per hour, equaling the amounts which a union employer would be required to contribute to the carpenters trust fund (Tr 123).

More than one year after completion of the Oak Hill project, the trustees of the five carpenters trust funds commenced this litigation in the Circuit Court of Multnomah County, Oregon, seeking an accounting and a decree requiring peti-

tioner to pay the contributions of 96¢ per hour as specified in the Carpenters Master Labor Agreement into the trust funds for all hours worked on the Oak Hills job by Jackson's non-union carpenter employees. The total contributions allegedly due to all five funds for the hours of these workmen on the Oak Hill job is $6,172.70 (P. Ex. 8). Since Jackson had already been paid for his subcontract work a fixed price which included the wages and fringe benefits paid by him to his non-union carpenter employees, the trustees sought, in effect, to impose upon petitioner in this litigation liability for a second payment of the fringe benefits already paid to these workmen.

In the trial court petitioner pleaded as an affirmative defense that the Subcontractors Clause of the Labor Agree-

ment was illegal, as in conflict with 29 USC § 186, if interpreted and applied to require petitioner to pay contributions into the carpenters trusts for the benefit of Jackson's employees. Demurrers of the trustees to this affirmative defense were sustained.

After a trial, the Circuit Court held that petitioner was obligated by the terms of the Subcontractors Clause to make contributions for the benefit of Jackson's carpenter employees to the five carpenters trusts. The Circuit Court, however, further held that equity would not require a "double payment" by petitioner to the three trust funds which provide direct benefits to workmen. Accordingly, the Court declined to require contributions to these three trust funds, and entered a decree requiring contributions only to

the two trust funds benefiting the industry generally.

The trustees appealed to the Oregon Supreme Court from the Circuit Court's refusal to require contributions to the three direct benefit funds. Petitioner cross-appealed from the ruling of the Circuit Court which sustained the demurrers of the trustees to his affirmative defense based on 29 USC § 186.

The Supreme Court of Oregon reversed the Circuit Court's refusal to require petitioner to make contributions to the three direct benefit funds. It also rejected petitioner's cross-appeal. The result is that petitioner has been ordered to make contributions to all five carpenters trust funds on behalf of the non-union carpenter employees of Jackson, the subcontractor.

The opinion of the Supreme Court of Oregon specifically holds that enforcement of the Subcontractors Clause by requiring petitioner to make contributions for the benefit of the carpenter employees of the subcontractor Jackson to the five trust funds does not violate 29 USC § 186.

REASONS FOR GRANTING THE WRIT

1. THE INTERPRETATION OF 29 USC § 186 BY THE SUPREME COURT OF OREGON IN THIS CASE PERMITS UNIONS TO REQUIRE CONTRIBUTIONS TO TRUST FUNDS ON BEHALF OF EMPLOYEES WHO ARE LEGALLY INELIGIBLE TO BENEFIT FROM THE FUNDS, AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT AND OF TWO U. S. DISTRICT COURTS

The decision below permits a union to penalize a union general contractor for using a non-union subcontractor by requiring the general contractor to make payments on behalf of the employees of the non-union subcontractor to trust funds from which those employees are legally ineligible to draw benefits.

It is clear that 29 USC § 186 prohibited Jackson from paying contributions for his employees directly into the carpenters trust funds. Since Jackson was not a party to any collective bargaining agreement or other written agreement specifying a detailed basis for such contributions, the exception of subsection 186(c)(5) to the prohibition of subsection 186(a)(1) is not met.

The U. S. Court of Appeals for the Second Circuit has held in two decisions, in accord with U.S. District Court

decisions in Tennessee and Pennsylvania, that subsection 186(c)(5), in effect, prohibits payment of benefits by union-employer trust funds to anyone other than present or former employees of employers lawfully contributing to such trusts. In the leading case of Moglia v. Geohegan, 403 F.2d 110 (CA 2, 1968), cert. den. 394 U.S. 919 (1969), the court held that subsection 186(c)(5) prohibits payment of benefits from such a trust to beneficiaries of a deceased employee whose employer had made contributions to the trusts for many years which were illegal for lack of the written agreement required by that subsection. In so holding, the court stated:

> "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 Trust."
> (403 F.2d at 116)

Moglia followed two U. S. District Court decisions, Rittenberry v. Lewis, 238 F. Supp. 506 (E.D. Tenn., 1965), and Bolgar v. Lewis, 238 F. Supp. 595 (W.D. Pa. 1960), both denying pension fund benefits to former employees for whom the employer had made no contribution to the fund because of first becoming a signatory to the labor agreement after the plaintiff's retirement. After quoting subsection 186(c)(5), the Court in Rittenberry concluded:

> "It is apparent from the foregoing language that the trust [sic] authorized by Section 302 were for the payment of benefits to employees of employers lawfully making contributions to union welfare trusts."
> (238 F. Supp. at 509)

Most recently, the U. S. Court of Appeals for the Second Circuit, quoting Moglia, held that payment of benefits from union-employer trust funds to employees of non-contributing employers is prohibited by subsection 186(c)(5). In re

Typo-Publishers Outside Tape Fund, 478 F.2d 374 (CA 2, 1973), cert.den. 414 U.S. 1002 (1973).[2]

Thus, employees of Jackson, a non-signatory subcontractor, could not lawfully be paid benefits from any of the carpenters trust funds because they are not employees of an employer contributing to the funds, as required by subsection 186(c)(5). Contributions to the trusts by petitioner on behalf of Jackson's employees would not, therefore, meet the requirements of subsection 186(c)(5) because they are not for the benefit of employees of "other employers making similar payments" to the trusts. Jackson has made no payments to the trusts (Tr 122).

Making contributions for Jackson's emp-

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[2]See also Blassie v. Kroger Co., 345 F.2d 58, (CA 8, 1965), at 71, holding that the statute prohibits trusts from paying benefits to persons "who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions."

loyees through petitioner[3] may meet the written agreement requirement of subsection 186(c)(5), but it does not meet the requirement that beneficiaries of the trust be solely employees of contributing employers.

The Oregon Supreme Court appears to recognize that its decision in this case is in conflict with Moglia v. Geohegan, supra. At footnote 4, the Oregon Supreme Court states (App., p. 1e, 1f):

> "We have not overlooked the statement by the Court in Moglia v. Goehegan, [sic] 403 F.2d 110 (CA 2, 1968) (at 116), that 'Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust.' It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read Moglia, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

[3]At the trial, a union representative admitted that the carpenters trusts will not accept contributions from a non-signatory employer, but would accept contributions on behalf of the employees of such an employer if made under report forms filed with the trusts by a signatory employer, such as petitioner (Tr 166,214). The report form (P.Ex.8), however, implies that the employees listed on it are employed by the reporting signatory employer.

The Oregon Supreme Court relies on Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182 (S.D.N.Y. 1960), decided eight years before the Moglia decision of the Second Circuit Court of Appeals. The district court in that case held that an agreement requiring an employer to make contributions to trust funds based upon hours of his own employees as well as hours of non-signatory subcontractors'

employees did not violate § 186.

The decision in Kreindler is distinguishable. The agreement there included the payroll of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractor's employees. Unless so distinguished, Kreindler appears to be inconsistent in principle with the later Moglia and Typo-Publishers decisions of the Court of Appeals for the Second Circuit.

2. THE EFFECT OF THE DECISION BELOW IS TO REQUIRE A UNION CONTRACTOR ON A JOB SUBJECT TO THE DAVIS-BACON ACT TO PAY DOUBLE FRINGE BENEFITS IF HE USES A NON-UNION SUBCONTRACTOR.

The HUD agreements in this case subjected the Oak Hills project to the Davis-Bacon Act, 40 USC § 276a (Tr 26). That Act requires employers to pay the "prevailing wages," including fringe benefits, to or for the benefit of all workmen on the job. The Act permits payment of fringe benefits either to union-employer trusts for the benefit of the workmen, or directly to the workmen.

In a job under the Davis-Bacon Act, the general contractor obviously must require his subcontractors to comply with that Act. The petitioner did so in this case, with respect to subcontractor Jackson (Tr 104-106, D. Ex. B). Since Jackson was not signatory to any contract providing for contribution of the fringe benefits to the carpenters trusts, he could and did pay them only directly to his men, in addition to their regular

wages (Tr 106, 123).

The decision below requires petitioner, as the general contractor, to pay the amount of the fringe benefits for Jackson's men a second time by a contribution in that amount to the carpenters trusts. This means that a Davis-Bacon Act job will cost a contractor more to perform if he uses a non-union subcontractor. Instead of carrying out the purpose of the Davis-Bacon Act to eliminate unfair competition by non-union employers paying less compensation to their workmen, the decision below applies 29 USC § 186 in a fashion which makes it more expensive for a union general contractor on a Davis-Bacon Act job to use a non-union subcontractor than if he used a union subcontractor. The amount of the penalty or extra expense is a doubling or second payment of the fringe benefits which a non-union sub-

contractor has paid directly to his men, since he cannot pay them into union trust funds.

3. THE DECISION BELOW INVOLVES A QUESTION OF STATUTORY INTERPRETATION IN THE APPLICATION OF 29 USC § 186 TO SUBCONTRACTOR CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS WHICH IS LIKELY TO ARISE IN THE FUTURE.

The use of clauses in collective bargaining agreements which require contractors to subcontract work only to union employers appears to be a growing trend. A recent survey found such clauses in about 75% of collective bargaining agreements in the construction industry. U.S. Bureau of Labor Statistics, Dept. of

Labor, Bull. No. 1864, "Contract Clauses In Construction Agreements," p.25 (1975). This Court recently had occasion to examine the anti-trust aspects of a sub-contractors clause in a non-collective bargaining agreement. Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, ___ U.S. ___, 44 L.Ed. 2d 418 (1975).

The wording of subcontractors clauses varies widely in construction industry collective bargaining agreements. Clauses requiring a signatory general contractor to make payments into union-employer trust funds for employees of non-union sub-contractors, as in this case, are not uncommon. The decision of the Supreme Court of Oregon in this case appears to be the first which expressly sustains the validity of that type of subcontractors

clause against a claim of violation of 29 USC § 186.

If the decision below is not reviewed and corrected, the use of this type of clause will undoubtedly become more wide-spread. In that event this Court will no doubt be called upon in the future to consider the same issue of the validity of such clauses under 29 USC § 186. Review of the Oregon Supreme Court's decision in this case would put this issue to rest at an early date.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oregon.

Respectfully submitted,

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December 24, 1975

APPENDIX

Opinion of the
Supreme Court of Oregon

IN THE SUPREME COURT OF
THE STATE OF OREGON

No.'s 389-034 through 389-038

E. A. SCHLECHT, et al., as
Trustees, etc.
Appellants

v.

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,
Respondent

(October 2, 1975)

Appeal from the Circuit Court
Multnomah County

TONGUE, J.

These five consolidated cases are suits in equity by the trustees of funds established under a labor-management contract against a general building contractor who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be "bound to all of the provisions of this Agreement" or else maintain records for the subcontractor's employees "and be liable for payment" of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and "construction industry advancement."

The nonunion subcontractor paid an amount equal to these "fringe benefits" directly to his employees in addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that "it is inequitable" to require defendant to make payments which "amount to double fringe benefits" to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that "it is equitable" to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as "funds which do not accrue benefits directly to the workmen."

Plaintiffs appeal from the decree in the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeals from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases.

In support of its appeal plaintiffs contend that upon finding that defendant was obligated by the terms

of his contract with the union to make "fringe benefit payments" to the plaintiffs for the employees of its nonunion subcontractor, the trial court erred in holding that as a court of equity it could, in effect, modify the terms of the contract by holding that defendant was required to make payments into only two of the five trust funds upon the ground that it would be "inequitable" to require payments to the remaining three trust funds.

The trial court recognized that "were I in law, having made the findings of fact, I would have no option but to grant judgment in all five cases for the trustees."

In *Wikstrom v. Davis et ux*, 211 Or 254, 315 P2d 597 (1957), we held (at 268) that:

> "Neither courts of law nor of equity have the right or power to make contracts for the parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must be the guide in construing contracts by the parties thereto. • • •"

To the same effect, see *City of Reedsport v. Hubbard et ux*, 202 Or 370, 385, 274 P2d 248 (1954), holding, in a suit in equity, that:

> "• • • The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. • • •."

In these five consolidated cases the trial court properly concluded that:

> "The labor contract required defendant to make fringe benefit payments to plaintiffs."

Nothing in the terms of the contract justified the court's requirement that payments be made by Walsh

to some of the trust funds, but not to all of them.[6] All the funds have equal standing under the terms of the contract. Payments due to each fund are calculated on the same hours worked per employee. The contract specifies identical legal remedies for failure to pay into any one fund or all of them.

Defendant contends that "the record in this case discloses at least innocent misleading of defendant and unclean hands," as well as laches, in that "the union officials failed to tell defendant until months after completion of the job that payment by Jackson [nonunion subcontractor] of fringe benefits directly to his men • • • would nevertheless leave defendant exposed for payment of the same sums into the trusts for the benefit of Jackson's carpenter-employees."

However, the testimony by defendant to support these contentions was contradicted by testimony offered by the union. The trial court rejected these contentions by its findings of fact and conclusions of law. After examination of the record, we agree with those holdings.[7]

Having so held, the trial court had no authority for "equitable reasons" to deny relief to the union in three of the five cases, while granting such relief in the remaining two cases. It follows that we must reverse the decree of the trial court in those three cases (cases No. 389-034, 389-035 and 389-036) unless we

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[6] The contract provided as follows:

"If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such subcontractor to be bound *to all the provisions of this Agreement, or* such contractor shall *maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this agreement.*" (Emphasis added)

[7] This testimony and these findings are discussed further below in connection with defendant's cross-appeal.

conclude that defendant is entitled to prevail in his cross-appeal, as next discussed.

Defendant's first contention on cross-appeal is that the "Subcontractors Clause" of the Carpenters Master Labor Agreement violates 29 USC § 186, to the extent that it may be applied to require defendant to make contributions to union trust funds for the benefit of employees other than his own, as pleaded in defendant's Fifth Affirmative Defense in each of the five cases. The trial court sustained plaintiffs' demurrers to those affirmative defenses.

It is provided in 29 USC § 186 (a) that:

> "It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce . . ."

An exemption is provided in § 186(c)(5) for certain payment by an employer to trust funds, as follows:

> "(c) The provisions of this section shall not be applicable • • • (5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)*: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; • • •." (Emphasis added)

Defendant says that:

> "The net effect of 29 U.S.C. Section 186, with respect to contributions to trusts, is to prevent

an employer from paying contributions to a trust for the benefit of anyone other than his employees or his employees as part of a pool with employees of other covered employers. The leading case on this point is *Moglia v. Goeghegan,* 403 F.2d 110 (CA 2, 1968), *cert. den.* 349 U.S. 919 (1969). • • •"

Defendant also cites other cases as following what he contends to be the rule as stated in *Moglia.*[6]

Defendant also says that:

"The key point of *Moglia* and its progeny is that 29 U.S.C. Section 186 requires that the employer's payments must be for the benefit of his own employees. It is clear that the payments demanded by plaintiffs and awarded by the Circuit Court in two of these cases fail to meet the test of *Moglia,* because defendant Tom Walsh & Co. is being required under the Subcontractors Clause to make payments into the trusts for the benefit of persons who are employees of Jackson, and not his own employees."

As we read *Moglia,* however, the primary holding of that decision was that payments by an employer into such a trust fund must be made pursuant to a *written agreement.* (See 403 F2d at 115-16.) The same is true of most of the *Moglia* "progeny." This is in accord with the purpose of 29 USC § 186 to discourage corruption by prohibiting payments by employers to unions, except for those permitted in accordance with restrictions provided by that statute.[7]

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[6] The cases cited by defendant include: *In re Typo-Publishers Outside Tape Fund,* 344 F Supp 194 (SDNY 1972), *aff'd* 478 F2d 374 (CA 2, 1973), *cert denied* 414 US 1002 (1973); *Insley v. Joyce,* 330 F Supp 1228 (ND 111, ED 1971); *Pidgeon v. Brunswick Port Authority,* 324 F Supp 140 (SD Ga 1971); *Local U. No. 529, U. Bro. of Carpenters, etc. v. Bracy Dev. Co.,* 321 F Supp 869 (WD Ark 1971); and *Doyle v. Shortman,* 311 F Supp 187 (SDNY 1970). See also *Caporale v. Di-Com Corp.,* 345 F Supp 153 (ND 111, ED 1972).

[7] We have not overlooked the statement by the court in *Moglia v. Goeghegan,* 403 F2d 110 (CA 2, 1968) (at 116), that "Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust." It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia,* that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement he would be liable for payments into the various trust funds for the employees of such a subcontractor. None of the cases cited by defendant involves such a written contract provision.

In addition, as pointed out in *Kreindler v. Clarise Sportswear Co.* 184 F Supp 182, 184 (SDNY 1960), also involving payments to a trust fund for employees of a nonunion contractor, in rejecting the defendant's contention that to qualify under 29 USC § 186 such payments must be for the sole and exclusive benefit of the employees of the employer making such payments, the court held:

"• • • There is no basis • • • for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by the statute 'for the sole and exclusive benefit of the employees of such employer • • • (*or of such employees • • • jointly with the employees of other employees* [*sic*] *making similar payments* • • •)' (Emphasis added)

"The construction of the statute contended for by counsel for Clarise would have most serious and unfortunate consequences. An employer whose employees were engaged in two crafts and who were members of two different unions could not lawfully contribute to the welfare fund of either

because neither would be for the benefit of all of his employees.

"The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal."

We agree with that statement.

See also *Bey v. Muldoon*, 223 F Supp 489, 495 (ED Pa 1963), *aff'd*, 354 F2d 1005 (3d Cir 1966), *cert denied*, 384 US 987 (1966); *Budget Dress Corp. v. Joint Board*, 198 F Supp 4 (SDNY 1961), *aff'd*, 299 F2d 936 (2d Cir 1962), *cert denied*, 371 US 815 (1962); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970).

The fact that these cases were decided prior to *Moglia* does not, in our opinion, mean that they are "not of value," as contended by defendant, not only because the decision is not binding upon this court, but because *Moglia* did not involve a subcontractor and there was no written agreement in *Moglia*, as in this case.

For these reasons, we hold that the trial court did not err in sustaining plaintiffs' demurrer to defendant's Fifth Affirmative Defense.

Defendant's second contention on cross-appeal is:

"Union officials failed to give defendant any 30-day delinquency notice as required by the Subcontractors Clause as a condition to defendant's liability for contributions for the benefit of a nonunion subcontractor's employees. The Circuit Court erred in failing to sustain this defense."

In support of that contention defendant points out that Article IV of the labor agreement provides that the union will notify the employer "within thirty (30) calendar days of any delinquent payment" to the trust funds.

Defendant says that if any such payments were owed to the trust funds for Jackson's employees "they were due on the 25th of July, 1971 through the 25th

day of December, 1971" and that "the evidence set forth in the records shows that no notice was given of any delinquency in payments • • • until November 16, 1972 • • •."

To the contrary, however, the trial court found that:

"6. Defendant was notified by union officials and by their attorney of defendant's responsibility to pay fringe benefit contributions to plaintiffs as required by the union contract.

"7. Defendant was informed by union officials and by their attorney that if Lloyd Jackson did not make the required fringe benefit contributions to plaintiffs that defendant was required under the union contract to make said payments."

We have examined the record and find that it supports these findings, with which we agree. The contract does not require that written notice be given.[6] Several witnesses testified that before the project in question was started it was made clear to defendant that he was responsible for payments into the trust funds for the employees of the nonunion subcontractor. In addition, and perhaps of more importance, at least one of the union representatives testified that at subsequent conferences with defendant on or about August 2 and August 12, 1971, within 30 days of the completion of the project, the defendant was again told that as the general contractor he was responsible or "obligated" for payment of "these items," and that he was "requested to take care of his obligation."

While much of this testimony was denied by defendant and while it may not be as clear as might be desired, after reading the entire record and after ac-

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[6] The contract provides as follows:

"The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)"

cording to the trial judge the benefit of his better opportunity to observe the demeanor of the various witnesses as they testified, as is usual in cases in which there is a conflict in the testimony, we agree with the findings of fact by the trial court. It follows that this assignment of error on defendant's cross-appeal must also be denied.

Defendant's final contention on cross-appeal is that the trial court erred in denying payment to defendant for the attorney fees incurred by him in the three cases in which the trial court denied relief to the union. Because, however, we have reversed the decrees of the trial court in those cases it follows that we need not consider this contention.

For all of these reasons, we reverse the decrees of the trial court in cases Nos. 389-034, 389-035 and 389-036, and affirm its decrees in cases Nos. 389-037 and 389-038.

Mandate of the Supreme Court of Oregon

STATE OF OREGON

SUPREME COURT

Mandate

E. A. SCHLECHT, et al., as Trustees, etc.
Appellants

v.

THOMAS J. WALSH, JR., dba TOM WALSH & CO.,
Respondent

Appeal from Multnomah County

No. 389-034

This cause on September 8, 1975, having been duly argued and submitted upon questions arising on the record, and the court having fully considered said questions as well as suggestions of counsel in their argument and briefs finds there is error

as alleged.

IT THEREFORE IS ORDERED and DECREED that the decree entered in this cause in the court below is reversed as to case number 389-034 in conformity with the opinion of the court herein.

IT FURTHER IS ORDERED that appellants recover from respondent their costs and disbursements in this court taxed at $149.59 and the further sum of $500.00 allowed as attorney fee on appeal.

IT FURTHER IS ORDERED that this cause is remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

ENTERED at Salem, Oregon, this 2nd day of October, 1975.[1]

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[1]Identical mandates were entered in each of the other 4 cases. 1/5 of the total costs and attorney's fees awarded in the Oregon Supreme Court is allocated to each of the five consolidated cases.

Service of the within _____ is hereby accepted in _____, Oregon, this _____ day of _____, 19____, by receiving three copies thereof.

_____

Attorney _____ for _____

I hereby certify that I served the foregoing _____ on _____ attorney for _____ on the _____ day of _____, 19____, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at _____ which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at _____, Oregon, on the day last above mentioned, with the postage thereon fully paid.

_____

Attorney _____ for _____

APPENDIX

In the Supreme Court
of the United States

October Term, 1975

No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

Petition for Certiorari filed December 24, 1975
Certiorari Granted March 1, 1976

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-76

In the Supreme Court
of the United States

October Term, 1975
No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WWALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,

Respondents.

On Writ of Certiorari to the Supreme Court of Oregon

INDEX

INDEX (Cont.)

RELEVANT DOCKET ENTRIES

Entries in the Docket of the Circuit Court of Multnomah County, Oregon No. 389-034*

March 9, 1973	File Complaint.
March 14, 1973	File Summons and return.
March 16, 1973	File Motion to make Complaint more definite and certain and to strike portions of Complaint.
April 11, 1973	File Notice of Deposition.
April 27, 1973	File Subpoena Duces Tecum to attend deposition.
July 18, 1973	File Order allowing in part and denying in part defendant's Motion against Complaint.
August 16, 1973	File Answer to Complaint.
August 27, 1973	File plaintiffs' Motion for leave to file Amended Complaint.
August 27, 1973	File plaintiffs' Motion to strike portions of Answer.
September 10, 1973	File Order denying plaintiffs' motions.
September 28, 1973	File Amended Answer.
November 9, 1973	File plaintiffs' Demurrer to first and fifth affirmative defenses set forth in Amended Answer.

* Docket entries in the other four consolidated cases, No's. 389-035 through 389-038, inclusive, are identical to those in 389-034.

November 30, 1973	File Order sustaining plaintiffs' Demurrer to first and fifth affirmative defenses.
December 7, 1973	File defendant's Memorandum in opposition to plaintiffs' Demurrer.
December 7, 1973	File defendant's Second Amended Answer.
February 11, 1974	File plaintiffs' Reply to Second Amended Answer.
February 20, 1974	File plaintiffs' Request for findings of fact and conclusions of law.
February 20, 1974	File Order consolidating the five cases.
April 30, 1974	File court's Opinion.
May 3, 1974	File plaintiffs' Trial Memorandum.
May 3, 1974	File defendant's Trial Memorandum.
May 3, 1974	File list of Exhibits.
September 9, 1974	File Findings of Fact and Conclusions of Law
October 9, 1974	File defendant's Motion for attorney's fees and costs.
October 9, 1974	File defendant's Cost Bill.
October 15, 1974	File Affidavits re attorneys' fees and auditor's fees.
October 17, 1974	File Decree.

November 12, 1974	File plaintiffs' Notice of Appeal and Designation of Record on Appeal.
November 12, 1974	File defendant's Notice of Cross-Appeal and Designation of Record on Appeal.
November 14, 1974	File plaintiffs' Motion for attorneys' fees and costs.
November 14, 1974	File Order allowing plaintiffs' Motion for attorneys' fees and costs in part.
December 26, 1974	File Motion and Amended Motion to correct transcript.
February 24, 1975	File Order settling transcript.

Docket Entries in Oregon Supreme Court

November 12, 1974	Notices of appeal and cross-appeal filed in Circuit Court.
March 20, 1975	File Brief of plaintiffs-appellants.
May 14, 1975	File Brief of defendant-respondent and cross-appellant.
July 14, 1975	File Reply Brief of plaintiffs-appellants and answering Brief on cross-appeal.
August 1, 1975	File Reply Brief of defendant-respondent on cross-appeal.
September 8, 1975	Oral argument.
October 2, 1975	File Opinion.
November 19, 1975	Issue Mandate.

COMPLAINT

(As Amended by Interlineation)

Plaintiffs allege:

I.

THOMAS J. WALSH, JR. is a resident of Multnomah County, State of Oregon, and at all times material herein has been doing business under the name and style of TOM WALSH & CO.

II.

On or about the 12th day of September, 1969, the defendant entered into a labor agreement with the Oregon State Council of Carpenters. A true copy of that agreement is attached hereto, marked Exhibit "A", and incorporated by reference as though set forth in full herein.

III.

The Carpenters Master Labor Agreement referred to in Exhibit "A" to which defendant is bound reads in part as follows:

Carpenters Labor Agreement 1968-1971

"ARTICLE XVII

HEALTH AND WELFARE

Section 1. In addition to the wage scales listed in Schedules "A" herein, all persons, parties, firms or corporations as listed in Schedule "B", or otherwise coming under the scope of this Agreement, who are, or may become signatory parties to this Agreement, agree that the existing Health and Welfare Trust Fund as established January

1, 1956, shall continue in full force and effect for the purpose of providing Health and Welfare benefits for all eligible employees covered by this Agreement, and shall pay into the existing Oregon - Washington Carpenters - Employers Health and Welfare Trust Fund the sum of twenty-five cents (25c) per compensable man-hour effective May 1 1968, to and including May 31, 1971. Such payments shall be made monthly in accordance with the requirements of the Trust Agreement, and all applicable provisions of the existing Trust Agreement shall continue in full force and effect. The fund established by prior contributions shall be recognized as a fund held in trust, and therefore, an appropriate depository for the contributions referred to herein above."

Defendant is also bound to the Carpenters Labor Agreement, 1971-1973, a pertinent part of which reads as follows:

Carpenters Labor Agreement 1971-1973

"ARTICLE XIV

HEALTH-WELFARE AND DENTAL

Section 1. In addition to the wage scales listed in Schedules "A" herein, all persons, parties, firms or corporations as listed in Schedule "B", or otherwise coming under the scope of this Agreement, who are, or may become signatory parties to this Agreement, agree that the existing Health and Welfare Trust Fund as established January 1, 1956, shall continue in full force and effect for the purpose of providing Health-Welfare and Dental benefits for all eligible employees covered by this Agreement, and shall pay into the existing

Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund: FOR HEALTH-WELFARE the sum of thirty cents (30c) per compensable man-hour effective June 1, 1971; thirty-five cents (35c) per compensable man-hour effective December 1, 1971, and; forty cents (40c) per compensable man-hour effective June 1, 1972; FOR DENTAL the sum of five cents (5c) per compensable man-hour effective June 1, 1971, and; fifteen cents (15c) per compensable man-hour effective June 1, 1972. Such payments shall be made monthly in accordance with the requirements of the Trust Agreement, and all applicable provisions of the existing Trust Agreement shall continue in full force and effect. The fund established by prior contributions shall be recognized as a fund held in trust, and therefore an appropriate depository for the contributions referred to hereinabove."

IV.

The trust agreement referred to in Exhibit "A" and paragraph III above is the "Trust Agreement, Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund," dated January 1, 1956, as amended November 5, 1956 and August 1, 1968. This trust agreement reads in part as follows:

"Article II

* * * * *

Section 9. Each contribution to the Fund shall be made promptly and in any event made so as to be received at the principal office of the Fund on or before the 25th day of the calendar month in which it becomes payable, on which date said contribution, if not then paid in full, shall be delin-

quent. . . . The parties recognize and acknowledge that the regular and prompt payment of Individual Employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult and impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an Individual Employer to pay such monthly contributions in full within the time provided. Therefore, the amount of damage to the Fund and the Health and Welfare Plan resulting from any such failure shall be the sum of 10 per cent of the amount of the contribution or contributions due, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in Portland, Oregon, upon the day immediately following the date on which the contribution or contributions.

In case of failure of an Individual Employer to make required contributions to this Trust Fund the Trustees may take necessary legal action to collect such withheld contributions as well as costs of such action and any damages to the Fund or Health and Welfare Plan caused by such failure to make said contributions."

* * * * *

"Article IV

* * * * *

Section 5. The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payment of reimbursement for expenses and damages due to delinquencies as provided in Section 10 Article II. If any Individual Employer defaults in

the making of such payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the Individual Employer who is in default reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim including any and all appellate proceedings therein."

Section 11. The Board of Trustees shall maintain suitable and adequate records of and for the administration of the Fund and the Plan. The Board of Trustees may require Employers, and Signatory Association, any Individual Employer Union, any Local Union, any Employee, or any beneficiaries under the Plan to promptly furnish the Board of Trustees on demand such payroll records, information, data, reports or documents reasonably relevant to and suitable for the purposes of such administration of the Fund and policies. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the Board for any such information, data, reports or documents. The Board of Trustees, or their authorized representatives, duly authorized in writing by one Employee Trustee and Employer Trustee, may examine the pertinent payroll records of each Individual Employer with respect to the persons benefiting from this Trust Agreement whenever such examination is deemed necessary or advisable by the Board of Trustees in connection with the proper administration of the Plan, the Fund and policies."

V.

Plaintiffs are the duly appointed and acting trustees under the trust agreement referred to in Paragraph IV above.

VI.

Said Carpenters Master Labor Agreements further provide in part as follows:

ARTICLE IV

SUB-CONTRACTORS CLAUSE

If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such subcontractor to be bound *to all the provisions of this Agreement*, or such contractor shall *maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement.*

VII.

Defendant contracted with one LLOYD JACKSON to do work covered by the Carpenters Agreement and that LLOYD JACKSON was not signatory to the Carpenters Agreement nor did defendant require said LLOYD JACKSON to be bound to all the provisions of this Agreement.

VIII.

During the period June 1, 1972 to date, said LLOYD JACKSON employed employees within the coverage of Exhibit "A" and the above referred to Trust Agreement. Defendant thus owes a sum of money to plaintiffs, the amount of which is unknown to plaintiffs, in contributions and liquidated damages and additionally owes the plaintiffs liquidated damages from the due date thereof until said payment is made.

IX.

Plaintiffs have demanded and defendant has refused an accounting to determine amounts which may be owed by defendant to plaintiffs as contributions and liquidated damages during the period June 1, 1972 to date by way of an audit as provided by the language of the trust agreement set forth above.

X.

Such an accounting is so complex and intricate that justice cannot be done without resort to equity's jurisdiction in that accurate determination of the amount which defendant may owe to plaintiffs requires complete examination of defendant's and LLOYD JACKSON'S payroll records, a determination of which employees performed work coming within the coverage of the agreements referred to above, computation of the number of hours worked by those employees in the months involved, computation of contributions and liquidated damages owed on those hours worked, allowance of credits where appropriate for re-

ported or over reported hours worked, and confirmation of the accuracy of these computations through the use of accepted accounting procedures.

XI.

Defendant, by reason of said trust agreement, is obligated to pay to the trustees for the benefit of said fund, the sum of 10% of any amount of contributions which may be found due and owing as a result of said accounting as liquidated damages.

XII.

Plaintiffs are entitled to recovery of their reasonable attorneys' fees plus other reasonable expenses incurred in connection with this suit. $1,000.00 is a reasonable sum to be awarded plaintiffs as attorneys' fees; and $250.00 is a reasonable sum to be awarded plaintiffs as auditor's fees and costs.

WHEREFORE, plaintiffs pray for an order and decree of this Court as follows:

(1) Requiring that an accounting be had by way of an audit and examination of defendant's and LLOYD JACKSON'S payroll records and accounts for the period June 1, 1972 to date to determine what additional amounts may be owed by defendant to plaintiffs as and for contributions and liquidated damages.

(2) Entering judgment against defendant for whatever amounts are found as owing as a result of the above accounting, plus an amount equal to 10% of said contributions that may be found due and owing as liquidated damages.

(3) Entering judgment against defendant for $1,000.00 as plaintiffs' reasonable attorneys' fees, $250.00 as auditor's fees plus reimbursement of costs in connection with the above accounting.

(4) For any other or further relief which the court may deem just and equitable.

[Exhibit A to the Complaint is the Memorandum Agreement set forth infra p. 73.

AMENDED ANSWER

* * * * *

FOR A FIFTH FURTHER AND SEPARATE AFFIRMATIVE DEFENSE, defendant alleges:

I.

Defendant re-alleges by this reference as if fully set forth the allegationso f Paragraphs I through VI, inclusive, of the First Further and Separate Affirmative Defense.

II.

Article IV of the 1971-1973 Carpenters Master Labor Agreement provides in full as follows:

"Article IV.

SUBCONTRACTORS CLAUSE

"If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the

employer shall require such subcontractor to be *bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employees job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement.*

"The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor, and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)

"No work will be let by piecework, contract or lump sum direct with a journeyman, apprentice or trainee for labor services.

"NOTE: See Article V, Section 4(e), Pre-Job Conference." [Emphasis supplied]

III.

The underlined portions of the said Article IV, as above set forth, purport to require defendant to pay to the trust fund of which plaintiffs are Trustees monies which are not for the sole and exclusive benefit of defendant's employees, in that such payments would be expended by the Trustees from the trust in whole or in part for the benefit of employees of Lloyd Jackson and of employees of other third party employers.

IV.

Upon the premises aforesaid, the payments which plaintiffs seek to recover in this case pursuant to the aforesaid Article IV would be illegal under 29 U.S.C. § 186, and Article IV is void and of no force and effect to the extent that it obligated defendant to make the payments claimed by plaintiffs in this case.

* * * * *

DEMURRER

Plaintiffs by their attorney, Joseph F. Ceniceros, move against defendant's Amended Answer as follows:

* * * * *

II.

Demur to defendant's Fifth Affirmative Defense on the ground that the matter alleged therein does not constitute a defense to plaintiffs' complaint.

ORDER

This Matter having come before the Court on Plaintiffs' Demurrers to Defendant's First and Fifth Affirmative Defenses contained in his Amended Answer, Plaintiffs appearing by their attorney Joseph F. Ceniceros, and Defendant appearing by his attorney D. H. Skerritt, and arguments having been heard, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Plaintiffs' Demurrers to Defendant's First and Fifth Affirmative Defenses be and hereby are granted.

Defendant will have ten days to plead further.

DATED this 30th day of November, 1973.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court for trial and evidence having been presented by the parties, the Court hereby makes the following:

FINDINGS OF FACT

1. Plaintiffs are trustees of an employee benefit trust.

2. Defendant is a building contractor who engages in general contracting work in the State of Oregon. In recent years, defendant, in addition to general contracting work, has concentrated in the construction of U. S. Department of Housing and Urban Development (HUD) low-income housing.

3. Defendant was at all material times a signatory to a Labor Agreement with the Oregon State Council of Carpenters (Pl. Ex. 1) and with the Oregon State Building and Construction Trades Council (Pl. Ex. 2).

4. Defendant employed Lloyd Jackson as a framing subcontractor on the job in question; Lloyd Jackson was a contractor, non-signatory to the Area Master Labor Agreement.

5. As a result, prior to and during the job in question, numerous meetings between defendant and various union officials were held regarding defendant's

use of Lloyd Jackson and demands to remove Lloyd Jackson from the job were made by the union officials and by their attorney on Walsh.

6. Defendant was notified by union officials and by their attorney of defendant's responsibility to pay fringe benefit contributions to plaintiffs as required by the union contract.

7. Defendant was informed by union officials and by their attorney that if Lloyd Jackson did not make the required fringe benefit contributions to plaintiffs that defendant was required under the union contract to make said payments.

8. Jackson did not make the fringe benefit payments to plaintiffs as required by defendant's contract with the Union.

9. Tom Walsh 4, Oreg. Ltd., paid Jackson the agreed contract price for his work. Jackson paid his employees on the Oak Hill project amounts equal to the fringe benefits payable to plaintiffs under the terms of defendant's contract with the Union.

CONCLUSIONS OF LAW

1. The labor contract required defendant to make the fringe benefit payments to plaintiffs.

2. The notice provisions of the subcontractor clause of the Labor Contract were complied with by the union officials.

3. Defendant had, in addition, constructive notice of the provisions of the subcontractor clause of the Labor Contract.

4. It is inequitable to require defendant to make payments to plaintiffs which amount to double fringe benefits to Jackson's employees. It is equitable to require defendant to make payments to those two funds which do not accrue benefits directly to the workmen-i.e., the Apprenticeship and Training Trust Fund (389-037) and the Construction Industry Advancement Fund (389-038), and inequitable to require defendant to make payments to the Health and Welfare Trust Fund (389-034), the Pension Trust Fund (389-035) and the Vacation-Savings Trust Fund (389-036).

* * * * *

DECREE

These cases having been heretofore consolidated and having come on for trial before the Court sitting without a jury, and the Court having heard the testimony and examined the evidence and having entered its Findings of Fact and Conclusions of Law on September 9, 1974, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Case Nos. 389-034, 389-035, and 389-036 be and hereby are dismissed, without costs to any party.

2. Defendant's motion for an award of attorney's fees in case Nos. 389-034, 389-035 and 389-036 is denied.

3. Plaintiffs in case No. 389-037 have judgment against defendant for unpaid contributions in the

amount of $175.01 plus liquidated damages in the further amount of $17.50, plus reasonable attorney's fees in the amount of $129.04, plus auditor's fees incurred by plaintiffs in the amount of $9.15, together with plaintiffs' costs and disbursements taxed in the amount of $31.86.

4. Plaintiffs in case No. 389-038 have judgment against defendant for unpaid contributions in the amount of $175.01 plus liquidated damages in the further amount of $30.00, plus reasonable attorney's fees in the amount of $129.04, plus auditor's fees incurred by plaintiffs in the amount of $9.15, together with plaintiffs' costs and disbursements taxed in the amount of $31.86.

EXCERPTS FROM TESTIMONY AT TRIAL

Testimony of Thomas J. Walsh, Jr.

[Tr. 16-21]

THOMAS J. WALSH, JR.

was thereupon called as a witness on behalf of the plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CENICEROS:

Q Mr. Walsh, I believe you stated your name, did you not, for the record.

A Yes, sir, I did.

Q Mr. Walsh, could you explain to the Court your relationship with Tom Walsh & Co.

A I am the sole proprietor of Tom Walsh & Co.

Q When was Tom Walsh & Co., the name, registered?

A 1967 to my best recollection.

Q What is the address of Tom Walsh & Co.?

A 2839 S. W. Second Avenue.

Q Here in Portland?

A Yes.

Q What type of work does it do?

A General contracting.

Q Does it specialize is [sic] any particular type of dwellings or buildings?

A We have almost exclusively constructed apartment dwellings.

Q All over the state?

A If you were to include the last year, yes. We have done some work in eastern Oregon and also done some down on the coast.

Q Prior to the Oak Hill job, which occurred in 1971, were you a part of any other business entities, partnership, joint venture, or anything of this kind?

A I had served as a general partner prior to that time in three limited partnerships.

Q What were those?

A Tom Walsh 1, Oreg. Ltd.; Tom Walsh 2, Oreg. Ltd.; and Tom Walsh 3, Oreg. Ltd.

Q When was Tom Walsh 1, Oreg. Ltd., started?

A Formed? October of 1968.

Q And Tom Walsh 2, Oreg. Ltd.?

A Approximately May or June of 1969.

Q And Tom Walsh 3, when was it formed?

A Approximately June of 1970.

MR. CENICEROS: Mark these, please.
(Whereupon Plaintiffs' Exhibits 1 and 2 were marked for identification.)

Q We might as well complete it. Tom Walsh 4, when was it started?

A I think it was filed with the corporation commissioner on the 1st or 2nd of June, 1971.

Q Could it have been June 8, if you know?

A I don't believe so. I think June 8 was the date that we had initial endorsement of this low-income project with HUD, and if my recollection serves, the limited partnership would have in the normal course been filed with the corporation commissioner approximately a week before that.

MR. NEIL: Your Honor, to eliminate confusion, we have been planning to offer as an exhibit the Certificate of Partnership, which does show filing of the partnership on June 8, 1971, if you would like to put it in.

MR. CENICEROS: Could I have this marked as either my exhibit or your exhibit?

MR. NEIL: That's fine.

(Whereupon, Plaintiffs' Exhibit No. 3 was marked for identification.)

MR. CENICEROS: I will introduce Plaintiffs' Exhibit 3.

MR. NEIL: No objection.

THE COURT: No. 3 is received.

MR. CENICEROS: May I approach the witness?

Q (By Mr. Ceniceros) Mr. Walsh, I would like to show you what is marked as Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2. Relating to Plaintiffs' Exhibit 1, is this the memorandum agreement, the

original that you signed with the Oregon State Council of Carpenters?

A Yes, sir, it is.

Q Referring to Plaintiffs' Exhibit 2, is this the copy, not the original, but a copy of the agreement that you entered into with the Oregon State Building and Construction Trade? I show you Page 3 of that document, which purports to be a copy of your signature, since the entire document is a copy.

A Page 3 certainly appears to be my signature. I would have no reason to question it.

Q Do you recall entering into an agreement with the Oregon State Building Trades?

A Yes, I do.

MR. CENICEROS: Your Honor, I would move to introduce Plaintiffs' Exhibits 1 and 2.

MR. NEIL: No objection to No. 1. Let me look at No. 2.

THE COURT: No. 1 is received.

MR. NEIL: No objection to No. 2.

THE COURT: No. 2 is received.

Q (By Mr. Cenciceros) Mr. Walsh, what was the type of partnership or legal entity of Tom Walsh 4, Oreg. Ltd.?

A It is an Oregon limited partnership.

Q And you are the sole general partner?

A That is correct.

Q How many limited partners are there?

A Three.

Q Who are they?

A Dennis J. Lindsay, Donald G. Drake, and George D. Leonard.

Q Now what is the — Let me put it this way. Is Tom Walsh 4, Oreg. Ltd., still in existence?

A Yes, sir.

Q And what is its address, business address?

A 2839 S. W. Second, Portland, Oregon, the same as my office.

Q The management of Tom Walsh 4, Oreg. Ltd., is, I take it, exclusively in your control.

A Exclusively in my control and subject to regulatory agreement of the Department of Housing and Urban Development.

Q Well, what you are telling me is it's exclusively within your control within the law.

A Within that, yes, but very much within that specific piece of documentation, that's regulatory.

Q Is Tom Walsh 4, Oreg. Ltd., in a construction field at the present time?

A No, sir.

Q Was it formed exclusively for the dwellings with the Oak Hill project?

A Yes, it was formed to sponsor, to construct, to own, and to manage that low-income housing project in Salem, and only that.

Q Would you explain the background of how you in your capacity, whatever capacity, became involved in the Oak Hill project.

A Very, very briefly. If at any point you want, I would be happy to go into more detail. As an individual I made application to HUD for a feasibility commitment. A commitment was issued to provide financing and subsidy for that project in Salem.

The limited partnership was formed, as is generally the case in this type of development, to sponsor, to construct, and to own that project. A firm commitment was issued by HUD to the partnership upon submission of plans and specifications, and sometime in the middle of June—Carl may have the document—initial endorsement, which is to say the final step in providing for the mortgage financing and provisions for the ultimate subsidy were granted by HUD to the partnership.

* * * * *

[Tr. 23-37]

Q When was the agreement with HUD and Tom Walsh 4 signed?

A It would have been approximately the 15th of January,* 1971.

Q So at the time of that signing had you contracted with any subcontractors to be used on the job, on the Oak Hill job?

A Yes. Usually after we receive—

Q Not usually. If you will confine yourself to this particular job. Had you lined up any subcontractors for the Oak Hill job?

A Oh, yes. The time is such that they have to be. After the firm commitment is received, then everything has to be put in order, the selection of all subcontractors in a significant number of cases.

Q You lined up the subcontractors then under your name.

A No. The subcontracts were all with the partnership.

---

* Reporter's error—word should be "June."

Q No, not as executed but as initially negotiated.
A I would have handled the negotiations personally.
Q Now the contract with Lloyd Jackson was signed June 15, 1971, was it not?
A Yes.
Q Now when did you first approach Mr. Jackson about doing the framing and other work on the job?
A I would have first talked to him probably the third week in May.
Q Was the initial contract by telephone or by letter?
A By telephone.
Q Did you ask for bids?
A Yes. We had advertised seeking subcontract bids I believe in both the Statesman and the Capitol Journal of Commerce Portland.
Q Do you have with you the advertisements for bids?
A No, sir, I don't.
Q Can you provide them, say, tomorrow morning?
A I could sure look. Very often we keep that kind of thing in our file because we carry an equal opportunity logo on the advertisements and keep them in the file. I do not want to guarantee that I could produce them. I would be more than happy to search our files tonight. I think I can.
Q Do you have your correspondence file with Mr. Lloyd Jackson?
A Yes, our correspondence file would be any written communication we have with him.
Q Do you have that here?
A No, I don't.

Q Would you bring that tomorrow?
A Certainly.
Q What contract did you let to Mr. Jackson on the Oak Hill job?
A The partnership executed with Lloyd Jackson the subcontract covering framing, siding, and I believe all finish cabinetry items.
Q Now did Mr. Jackson, to your knowledge, have a contract with a union? Was he a union contractor?
A At that time I was unaware of whether he was union or non-union.
Q When did you become aware of his status?
A On the 21st of June.
Q And what did you find out?
A I found out from Earl Kirkland that he was non-union.
Q Now Earl Kirkland, what is his capacity? Would you explain that for us.
A I believe at that time Earl was executive secretary of the Portland Building & Construction Trades Council.
Q Where did this notification take place?
A In Mr. Kirkland's office in the Portland Labor Center.
Q How did it happen that that meeting took place?
A He called me on the telephone. My office is two blocks from there. He said he thought we had a possible problem in Salem. Could I drop down to his office.
Q And I take it you did.
A Rather quickly.

Q Who was present at that meeting?
A Mr. Kirkland, Bob Stanfill, and myself.
Q Who is Bob Stanfill?
A He is, I believe, the executive secretary of the Oregon State Building & Construction Trades Council.
Q Now both Mr. Kirkland and Mr. Stanfill are obviously union officials.
A Correct.
Q What did they inform you at that time?
A Earl asked me if we had signed the contract with Lloyd Jackson, and I said yes; and he then informed me he was a non-union carpentry subcontractor.
Q What was decided at the meeting, if anything?
A Nothing was really decided. I pointed out to Earl I guess two things. One, that it being a federally assisted job, that it was bound by Davis-Bacon. So there was nothing at issue where we were putting union contractors at a competitive disadvantage because of a non-union contractor paying lower wages. And, secondly, that in our rather extensive search in the mid-Willamette Valley area, that Mr. Jackson was the only framing subcontractor that we could locate who was able, strictly in terms of manpower, the size of the job, to meet our qualifications to do the work. I think we had had one other — only one other framing bid submitted, and it was from a very, very small three or four-man firm unable to handle a job of that size with the time requirements.
Q Did Mr. Kirkland or Mr. Stanfill at this meeting

advise you of the consequence of having a non-union sub on that job?
A Not specifically. He said it was going to cause problems. At the very same meeting, the same issue was brought up about Dayton Plumbing Company. My response was much the same. The only one capable of doing the job that submitted a bid.
Q Could you be a little more specific? It was going to cause problems?
A Yes, it was going to cause problems. We had the possibility of pickets, and we had a responsibility to see both that wages and fringes were paid.
Q You say that he stated that you had a responsibility to see that fringes and wages were paid?
A Yes.
Q Did he elaborate on that?
A No.
Q Did you at that time have a copy of the carpenters agreement?
A Not to my knowledge I did not.
Q You signed Plaintiffs' Exhibit 1. Was it not in the booklet —

MR. CENICEROS: Mark this.

(Whereupon, Plaintiffs' Exhibit 4 was marked for identiifcation.)

MR. CENICEROS: May I approach the witness, Your Honor?

THE COURT: You may.

Q (By Mr. Ceniceros) Was it not in a booklet marked Plaintiffs' Exhibit 4, which is a booklet with three copies of a memorandum agreement in the rear,

the last three pages.

A No, sir, to my knowldge it was not. I recall specifically meeting with Swan Nelson and an older gentleman. I want to say Bailey, but that's not correct. Dan Frazer. Meeting with Nelson and Frazer in '69. As I recall, I signed the memorandum agreement, and there was an understanding that the master agreement would be sent to me. I believe they were either out or it had just been reprinted. It was some time, much, much later that I came into possession of this. I think it was during our discussions in the summer of '71.

Q Now were you given a copy of the memorandum agreement?

A Yes.

Q You had a copy of the memorandum agreement. When you signed the Building Trades Agreement in 1970, were you given a copy of that?

A Yes.

Q So at the time of this meeting at Mr. Kirkland's office of June 21st you had at least a copy of the memorandum agreement and a copy of the Building Trades Agreement in your records.

A In our files, yes, sir.

Q What did you tell Mr. Kirkland about the resolution? You mentioned that you had told him about two things. Jackson was the only subcontractor — or, excuse me, framing contractor and that the job was subject to the Davis-Bacon Act. Did you say anything else?

A No, I don't recall anything specifically even pertinent to that issue being discussed at that time.

Q But he did inform you that you were responsible for the wages.

A Responsible for the payment of wages and fringe benefits.

Q Did you tell Mr. Kirkland or Mr. Stanfill at that time that you were not a union contractor on that job, on the Oak Hill job?

A No. I believe we discussed that to the best of my knowledge the remainder of the subcontractors would be union. We knew who the electrical subcontractor would be. We knew the excavating subcontractor, the drywall subcontractor, the finish hardgoods subcontractor.

Q Was it your intention to maintain as good a relation with the unions as possible under the circumstances?

A Yes.

Q But to get it clear, you did not tell Mr. Kirkland or Mr. Stanfill about any contention that, as far as the Oak Hill job was concerned, you were a non-union general.

A No, I don't think the question ever came up was I a union or a non-union. We were talking about those two specific subcontractors.

Q Now at the June 21st meeting was another pre-job conference arranged?

A No.

Q Let me explain. In the depositions there was some confusion as to the definition of a pre-job conference. I take it there was a conference between

yourself, officials of HUD, where no union personnel were present, prior to the Oak Hill job.

A That is correct. That's not what I call a pre-job conference.

Q Now at the June 21st meeting with Mr. Kirkland, did he not arrange another meeting before the Salem Building Trades which was subsequently held on June 28?

A No, sir, he made no such arrangements.

Q Who made those arrangements? Was there a meeting on June 28?

A No, sir, there was not.

Q Was there a meeting on June 30th?

A Yes, sir, there most certainly was.

Q Was it before the executive committee of the Salem Building Trades, a meeting?

A It was with George Reed — I don't know who the members of that executive board are. I can tell you approximately who was here. George Reed was there from the plumbers. I think he is also secretary of the Salem Building Trades. Herb Jennings was there representing the carpenters. Mike Dye was there as their attorney. There was a gentleman whose name I do not remember who was there from the laborers, and there may have been somebody there from the painters union.

Q Were sheet metal workers present?

A Not to my recollection, but I certainly wouldn't —

Q There were several gentlemen there from the union?

A I would say possibly five, possibly six.

Q And this was held in the Labor Center in Salem?

A In Salem, yes.

Q I might indicate that their records show, as the evidence will come out, that it was on June 28. If you say June 30, I don't think it matters that much. At any case, there was a meeting, a subsequent meeting.

A Yes.

Q Now what occurred at that meeting?

A It started out with George Reed telling me in effect to get rid of the two non-union members.* I told him that just because they were non-union that I could not break their subcontracts. I had signed contracts with them that only for cause could I or would I dismiss them. There was a mention very similar to Mr. Kirkland's of approximately ten days before, "Don't you realize you are responsible for the payment of wages and fringe benefits?" I said, I recognize that I am responsible for those. You have got to understand, gentlemen, that the job is governed by Davis-Bacon. Each subcontractor and myself as general contractor are required to submit to HUD weekly payroll reports and show that each man has been paid not less than the prevailing wage and that under Davis-Bacon those fringe benefits have been paid.

Q Was it your impression under the Davis-Bacon Act that you were required to make the payments to the men, or could you make them to a trust fund?

A You can make them to either. Well, on the form, which I gather has been derived pursuant to Davis-

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*Reporter's error—word should be "subcontractors."

Bacon, there are two boxes on the back. You check one or the other that fringe benefits have been paid in cash to the men or to an approved trust fund for the benefit of the workmen.

Q So you had no impression that you were required — that the Davis-Bacon Act required the fringes to be paid to the men.

A No, I was not aware at that time. Much later I think Carl may have mentioned it in his opening remarks. I was not aware at that time that for a non-union or a non-union member that Davis-Bacon could be satisfied by the payment of his benefits to a trust fund. I was under the impression that the trust operated for the benefit of union members.

Q You have operated under a lot of these Davis-Bacon Act projects, have you not?

A Yes, sir.

Q Don't they customarily have a meeting between the officials of HUD? Mr. Headley probably comes down, and you are instructed on filling out a certified payroll record.

A Yes. I think probably after our first job we seldom got into filling out forms. We have a gal in the office who does them and who supervises the subs.

Q You are given a packet of paper containing instructions. Whether you know them or not, you are given it, are you not?

A Correct.

Q Now did you tell anybody at that meeting that the fringes were being paid by Mr. Jackson to his men?

A I don't believe it came up at that meeting. I think

it came up at the meeting on June 21st with Mr. Kirkland and Mr. Stanfill that if that was an issue and Lloyd was non-union, he was nonetheless required to make those payments. They would in that case, I assume, be paid to the men.

Q Now were you told at that meeting by Mr. Dye that the subcontractor clause required you to be responsible for the payments of fringes or wages?

A Much in the context I have already said that I was responsible to see that prevailing wage and the fringe benefits were paid.

Q Was the subcontractor clause mentioned by name?

A No.

Q Did you tell Mr. Dye or anybody present at that meeting that you were not bound by a union contract?

A No.

Q I take it, to cut this down, there were a series of meetings, were there not, with union officials about the problem at Oak Hill?

A There was a series of meetings. I described them more about the resolution. The series of meetings, to cut the whole thing short, that took place then over the months of July and August, which Mr. Coles was present at least two and possibly three, pretty much exclusively concern themselves with efforts on the part of union carpentry officials and with some assistance from me to bring Lloyd Jackson's operation into the union.

Q During any of those meetings, and I have them on June 28, August 2, August 10, and August 23 —

A There are others in July as well. I think you have touched on the major ones.

Q At any of those meetings were you told by any union official present that you had to pay the fringes to the trust fund in Lloyd Jackson — you would be responsible? You had to pay the fringe benefits for Lloyd Jackson's men?

A No. The fringes never came up again. Those meetings were all in a very positive sense. Either Lloyd or his son present at a number of them, not all of them but a significant number of them.

Q I am just referring to the ones you were present at.

A That's all I am talking about. The subject of fringes anyway never came up again after the June 30th meeting.

Q Was the subcontractor clause referred to by name at any of those meetings?

A No.

Q Now in any of these meetings did you tell any of the officials present that you were not a signatory to any union contract?

A No.

Q Did you at that time believe you were bound by union contract, that you as a general were a union contractor?

A Sorry. You have to restate the question.

MR. NEIL: I think that's confusing, Your Honor. He is saying, "You as a general." The question* has been that Tom Walsh 4 was the general

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Reporter's error—word should be "evidence."

on this project. He obviously has been general on other projects. I think he should be clear as to what he is talking about here.

Q (By Mr. Cenciceros) All these meetings concerned the Oak Hill job?

A Yes.

Q You were representing Tom Walsh 4 at these meetings, were you not?

A No. What I was really doing there was as an individual who could bring union and specifically carpenter union officials together with Lloyd Jackson, in whom they had a major interest in organizing. The subject was not specifically the Oak Hill job. It wasn't really very indirectly the Oak Hill. It was, how do we bring Lloyd Jackson and his substantial number of employees into the carpenters union? That was what we were striving for.

Q He had about six carpenters on the Oak Hill job, did he not? It varied, but that was about the average?

A Oh, I think the average was at least that, and as they were in different phases, they were different people. I think, if my recollection serves correctly, Lloyd probably had 25 or 30 employees at that period of time.

Q Not at the Oak Hill job.

A No, on a number of jobs. I think he probably in peak times was running— We could check. You may have the payroll records with you. I think some weeks—Well, I know it ran over on to two sheets, and they probably list a dozen employees a

sheet. So he may have had 15 to 18 employees on the Oak Hill job at some times.

Q When you were told by any of these union officials you were responsible for the wages and the fringes, it was at meetings concerning the Oak Hill job, was it not, and specifically Lloyd Jackson?

A That subject was discussed twice, the meetings of June 21 and June 30.

Q At either of those meetings did you tell them—and I believe you answered "no," I will ask you again. Did you tell them that you were not bound by the union contract? That the general contractor, Tom Walsh 4, Oreg. Ltd., was not a union contractor?

A No, sir. That subject did not come up.

* * * * *

Testimony of Michael Dye

[Tr. 80-83]

MICHAEL DYE

was thereupon called as a witness on behalf of the Plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CENICEROS:

Q Mr. Dye, what is your occupation?

A I am an attorney.

Q Are you a member of the Oregon Bar?

A Yes, I am.

Q And where is your office?

A In Salem.

Q Mr. Dye, do you represent the Building Trades in the Salem area?

A That's correct.

Q I would like to call your attention to June of 1971. Did the Oak Hill project come to your attention in your function as an attorney?

A Yes, it did.

Q How did it come to your attention?

A Well, as I indicated on my deposition, two ways. One is the project is directly behind our offices, about a block behind, so it came to my attention because I noticed it was there. Secondly, so far as the labor problems, which is the problem you are referring to, Mr. Reed, who at that time I believe was secretary of the Salem Building Trades Council, contacted me about it with some problems that he was having with Mr. Walsh and various members of the Trades Council were having with Mr. Walsh.

Q Now did you attend a meeting at which Mr. Walsh was present?

A Yes, I did.

Q And when was that?

A The latter part of June. I also indicated in the deposition. I couldn't give you an exact date, but I would say it would have been within the last two weeks of June, 1971.

Q And who was present at that meeting?

A Mr. Walsh was. Mr. Reed was. I was present. Mr. Glen McCall was present, who was secretary-treas-

urer of the I.B.E.W. Electrical Workers Local. I believe Bob Fisher was there, who was the secretary of the laborers in that area. Perhaps one or two other members.

Q Was Mr. Jennings there?

A Either Mr. Jennings or Mr. Meyers was there or both. I don't have any specific recollection of which one. I know the carpenters were represented, but I couldn't tell you which one was.

Q Now about how many people altogether were there?

A I would say between seven and ten.

Q How long did the meeting last?

A Approximately an hour. I was told it lasted approximately an hour. I would say I was not there more than perhaps twenty minutes.

Q The meeting continued after you left?

A Yes.

Q What was your function there? What were your duties?

A My primary function at that meeting was to inform Mr. Walsh of how the various locals that were concerned about some problems on the job—and in particular, laborers, carpenters, and plumbers—viewed his having non-union carpenters on that job, and to inform him of what we felt the course of action we would take if he did not correct it.

Q What did you tell Mr. Walsh?

A I told him that as far as we were concerned, he was responsible for some substantial amount of damages if the action continued which was going on. I indicated to him that I felt that he was responsible for damages in a number of areas. One of the areas would be to the various locals involved for breaching the contract. In particular, having non-union contractors there. And he was responsible then for possibility of loss of wages for members that were on the seniority list, which is a questionable thing; also for the loss of dues revenue to the unions for having non-union members involved; and additional loss of initiation fee to the unions for non-union people there; and very specifically, because of the agreement that I had learned he had signed with the carpenters and also the Building Trades Council, his liability to various trust funds involved.

Q What did you tell him? Obviously you don't remember the exact words, but the substance of what you told him on the latter point, his responsibility on the fringes.

A I indicated to him that because of the agreements that were signed, I felt that he would be responsible to the various trust funds involved, and particularly the carpenters and plumbers because I didn't have any specific knowledge of the agreements with the laborers, so I have to exclude that part of it; but as far as the plumbers and carpenters were concerned, direct liability to the various trust funds involved under their respective agreements for breaching the subcontractor clause of the Oregon State Building Trades Council agreement they signed, and also to my understanding they signed the carpenters agreement, too.

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[Tr. 98]

Q Do you recall making a statement at either of the meetings to Walsh that even though Lloyd Jackson is paying the fringes in cash to his men, that Walsh, if he continues on the job, will also have to pay them through the trust funds?

A Yes. No question about that, because the subject came up.

Q Did you tell him that? That's the question.

A In those words?

Q Yes.

A I doubt if I said it in those words.

Q Did you make that known to hi.

A Yes.

Q How?

A By conversation with him we had, because—

Q Tell me— Excuse me, go ahead.

A Mr. Walsh, one of his positions at that meeting was that—

Q Which meeting?

A At the June meeting. Was that possibly he would not have to incur liability because the fringes were being paid via cash to the men to come up to the standards of Davis-Bacon. I think I indicated to him—in fact, I know I did, but the exact words I cannot tell you—that irregardless of that, there is still a responsibility contractually to the carpenters trust fund and possibly the plumbers trust fund.

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[Tr. 101-102]

THE COURT: I am curious about one thing. You say you talked to Mr. Reed since the deposition was taken in February on this rather critical issue of whether there was discussion that Walsh would still have to pay the funds even though direct payments were being made to the men.

THE WITNESS: I think, if I can refer to my depo, when he was talking about it, I think the question was, "QUESTION: Was there any discussion at that meeting whether or not Jackson was paying the fringes directly to his men? ANSWER: I don't believe so at that meeting." And as to that specific meeting I think that was in error. As to whether Mr. Walsh was directly responsible to the trust funds, there is no doubt in my mind that that was explained to him and covered before, but as to that question alone, I think I was in error.

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Testimony of Victor Lloyd Jackson

[Tr. 103-106]

VICTOR LLOYD JACKSON

was thereupon called as a witness on behalf of the Defendant and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEIL:

Q Would you state your name, please.

A Victor Lloyd Jackson.

Q Where do you live, Mr. Jackson?
A In Salem, Oregon.
Q What is your business?
A I am a framing contractor.
Q Were you involved in the Oak Hill project in Salem?
A Yes, I am.
Q And what role did you have in the job?
A I did the framing, the foundations, and the finish.
Q By "I," you mean you and employees working under you?
A Right.
Q On that job were you operating as a proprietorship?
A Yes.
Q And did you enter into a subcontract, a written subcontract on that job?
A Yes, I did.

MR. NEIL: Could this be marked as a Defendant's exhibit and be shown to the witness?

(Whereupon, Defendant's Exhibit A was marked for identification.)

Q Is that a signed copy of the subcontract you entered into?
A Yes, it is.

MR. NEIL: We ask that Exhibit A be admitted, Your Honor.

MR. CENICEROS: Could I see it, please? (Pause.) No objection.

THE COURT: It will be received.

Q (By Mr. Neil) Did you understand this to be a HUD sponsored project, Mr. Jackson?

A Correct.
Q Have you worked on other HUD projects also?
A Yes, I have.
Q What was your understanding on the Oak Hill project as to what level of wages had to be paid to your men?
A It was called so-called prevailing wages described by HUD.
Q And what does that prevailing wage consist of?
A I don't have the figures in front of me.
Q I don't want the figures. It's the basic hourly rate.
A Basic hourly rate plus benefits.
Q Does it amount to the same rate that a union contractor would have to pay?
A Basically at the time the job was set up, yes.
Q By the way, were you a union contractor?
A No. Non-union.
Q Were you required to submit wage reports to HUD?
A Yes, weekly. We had to make weekly certified reports.
Q And did you submit such reports?
A Yes.

MR. NEIL: I will ask the clerk to mark these documents Exhibit B and show them to the witness.

(Whereupon Defendant's Exhibit B was marked for identification.)

Q Is Exhibit B a copy of your weekly payroll report to HUD, plus a copy of the back page of one of those reports?

A It appears to be.

MR. NEIL: I think counsel can stipulate that it is such a copy, Your Honor, since he handed it to me.

MR. CENICEROS: Yes, Your Honor. I was going to introduce them. I will stipulate to its introduction.

THE COURT: It is received.

MR. NEIL: We ask that it be received.

THE WITNESS: I have the originals if you want them.

THE COURT: Exhibit B is received.

Q (By Mr. Neil) Mr. Jackson, did you, in fact, pay the prevailing wages, that is, both fringes and the regular rate to your men?

A Yes, we did.

Q And did you so certify or your accountant so certify on these reports?

A Yes.

Q Who did you turn these reports over to?

A They were mailed I believe to Tom Walsh & Co.

Q And he saw to it that they were filed with HUD; is that right?

A That's the way I recall. Now my bookkeepers was authorized to sign those reports and mail them in. So consequently, I didn't mail them myself, my accountant did, but I am sure they went to Tom Walsh.

Q Were you present at any meetings— First of all, lets bring out when this job took place. The payroll records indicate your first week on the job was the week ending June 22, 1971; is that correct?

A That seems to be correct.

Q And the last report is for the week ending November 30, 1971; is that correct?

A That seems to be correct, yes.

Q So that marks the period your men were on the job.

A Right.

* * * * *

[Tr. 109-114]

Q When you were meeting with both Walshes and the union people, as you say, the union people were trying to persuade you to become a union contractor; is that right?

A Well, you might put it that way.

Q Did you express to them at these meetings what your problems were in becoming a union contractor?

A Yes, and I am sure they understood the problems.

Q What did you tell them?

MR. CENICEROS: Well, Your Honor, what relevance does this have? They tried to get him to go union. He was telling them his problems.

MR. NEIL: I think, Your Honor, the relevance is —

THE COURT: This is an offer of proof. It isn't being accepted at this time. So I think the objection is preliminary.

Q (By Mr. Neil) What did you [tell] them were your problems?

A Well, basically —

MR. CENICEROS: Excuse me. Whom did you tell?

A Whoever was at the meeting, the union representatives, that I was obligated under contract to do jobs for certain "X" amount of dollars and which couldn't be done at a union scale. I was not talking about the Walsh job. I was talking about other jobs, and they realized this. So the question came, how do I complete my obligations and still find a union contract? This is what the main discussion was, is to devise a way, if we elected to go union, how could we complete our work that was in progress.

Q Was there any discussion of your competition, that is, whether your competition in Salem was unionized or not unionized?

A Yes, there was. When you say competition, in the field of apartment house framing that I was in. I am sure there was discussion on it, because my competition is such we are all non-union. This is where the problem arises.

Q In the Salem area?

A Right, in the Salem area.

Q You consider yourself a framing subcontractor?

A Right.

Q What does framing involve?

A Well, it covers a multitude of sins, but primarily it's considered to be a specialty item. We go from the foundation to the roof.

Q Is that a special type of carpentry work?

A It has become that in recent years. It evolved into such. A general contractor can be a framer. A framer may not be a general contractor, because

he specialized in certain items.

Q Are all carpenters qualified framers?

A They could become qualified framers.

Q But are they?

A I would say no.

Q Is that a specialty within the field of carpentry?

A It has become in certain areas, become a specialty.

Q What was the size of this Oak Hill apartment project? How many units?

A Oh, 56, I believe.

Q And how many men did you have? What variation did the size of your framing crew have on that job?

A Oh, it averaged somewhere between nine to thirteen people. Sometimes we only had one or two, but around nine to thirteen as I recall.

Q Was there any other framing subcontractor or contractor in the Salem area to your knowledge, union or non-union, that had the men to do a job of that size at the time of the Oak Hill project?

A No, not really.

Q Where would the nearest contractor be that would have enough qualified men?

A I presume the Portland area has qualified. There was contractors that are qualified, but not framing contractors.

MR. NEIL: Could he be shown that Exhibit A?

Q Your subcontract is with Tom Walsh 4, Greg. Ltd.; is that correct?

A Right.

MR. NEIL: That's all. Thank you.

THE COURT: Mr. Ceniceros?

MR. CENICEROS: Your Honor, that was a long offer of proof. I would like to inquire about only one portion of it but still—I will waive my objection to that portion but not to the rest.

THE COURT: Go ahead.

MR. CENICEROS: And the portion I waive my objection to is whether — Well, let me do it this way. I will submit this as an offer of proof in opposition to his, without waiving my objection.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. CENICEROS:

Q Mr. Jackson, you are not the only framer in the Salem area, are you?

A No.

Q And there are general contractors in the Salem area that also do framing.

A I am sure there is, because commercial work in Salem is all done by general contractors, and they are all union.

Q And so you have in a job the size of Oak Hill you have competition that could have done the job, the framing part of that job from the general contractors.

A I will rephrase that. There are general contractors in Salem capable of doing that job but not subcontractors.

Q But don't some of the general contractors in Salem

also do framing subcontracting?

A Not to my knowledge. Not to my knowledge. If there is, I don't know who they would be.

Q Is it unusual on a large construction project or the size of Oak Hill for a framer from another part of the State to come in?

A It's been done.

Q Have you done any other work for Tom Walsh?

A No.

* * * * *

[Tr. 122-124]

REDIRECT EXAMINATION

BY MR. NEIL:

Q Mr. Jackson, did you know at any time during the Oak Hill job or did you believe that you could have paid the fringe benefits to the union trust fund as opposed to the men?

A I don't think I could.

Q Why not?

A I think you have to sign a contract with the union in order to do it. I don't know.

Q I am asking you what your impression was at the time.

A The impression at the time was that I couldn't.

Q You then felt the only thing you could do was pay to the men, right?

A Right, and that's my understanding now. I may be wrong.

MR. NEIL: Thank you, Mr. Jackson. No further questions.

RECROSS EXAMINATION

BY MR. CENICEROS:

Q But you are not required by the Davis-Bacon Act to pay directly to the men.

A No.

MR. CENICEROS: That's all.

THE COURT: I will excuse the witness.

(Whereupon, the witness was excused.)

MR. NEIL: I understand counsel is willing to stipulate that Mr. Jackson did, in fact, pay the fringes to his men throughout his job.

MR. CENICEROS: Yes, Your Honor. We entered into two stipulations, one based on an examination of Mr. Jackson's payroll records and by our auditors; and when I say an examination, a comparison of the certified payroll records with his regular payroll records. We are prepared to stipulate that he did pay the fringes to the men. Also there was a discrepancy, however, found between the regular payroll records and the certified records, 32 hours, 32 and ½ hours, something like that. We are prepared to stipulate that in the event the Court rules in favor of the Plaintiffs, the audit can be corrected to that extent.

MR. NEIL: So stipulated.

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Testimony of Earl B. Kirkland

[Tr. 125]

EARL B. KIRKLAND

was thereupon called as a witness on behalf of the Plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CENICEROS:

Q Mr. Kirkland, what is your occupation, sir?

A I am Executive Secretary of the Columbia Pacific Building and Construction Trades Council, AFL-CIO.

Q In that capacity, did you have occasion in June of 1971 to talk with the Defendant here, Mr. Tom Walsh?

A Yes.

Q Did you have a meeting on or about June 21st, 1971, in your office with Mr. Walsh about an Oak Hill job that was going on in Salem?

A Yes.

* * * * *

[Tr. 126-127]

Q Now at the meeting in your office Mr. Walsh was present and Mr. Stanfill was present. Was anyone else present at the first meeting?

A I don't believe so.

Q Were the problems on the Oak Hill job referred specifically to Lloyd Jackson, the framing contractor, and a plumbing contractor called Dayton Plumbing? Is that not true?

A Yes.

Q And did you inform Mr. Walsh of the consequences of having a non-union subcontractor on the job?

A Yes, I did.

Q Did you specifically refer to the subcontractor clause?
A Yes.
Q What did you tell him in regards to the subcontractor clause?
A Well, I called his attention to the agreement. I read him the part of the agreement, subcontractor clauses, the part involving wages and fringes, which he said he understood and knew the problem.
Q What did you tell him his responsibilities were under that, if anything?
A I told him his responsibilities were to live up to that agreement, which called for all his subcontractors to be on an agreement with the respective craft unions and pay the proper wages and fringe benefits.
Q Did you tell him to whom the payments of the fringe benefits were to be made?
A Into the various trusts, of course.
Q Did he indicate to you at that time that the fringes were going to be paid to the men of Lloyd Jackson?
A Well, he indicated that he knew that he was also guided by the Davis-Bacon act because of it being a HUD job and that proper wages and fringe benefits would be paid the non-union people.
Q Did he indicate that in his opinion the payment of the fringes to the men would satisfy his obligations under the union contract?
A No.

* * * * *

[Tr. 133-134]

Q Are you aware of the fact that the union trust funds will not accept contributions directly from a non-union employer?

MR. CENICEROS: Your Honor, we will stipulate to that.

MR. NEIL: Okay.

Q Are you aware of that?
A Would you repeat your question?
Q Well, counsel said he will stipulate to the fact that the union trust fund, the carpenters union trust fund, will not accept contributions directly from a non-union employer, only if they are made via a signatory to the agreement such as Tom Walsh.
A Yes, I am aware of that.
Q Did you tell Walsh that at the June 21 conference?
A No, I don't think I did.

* * * * *

Testimony of Allen W. Emrick

[Tr. 142]

ALLEN W. EMRICK

was thereupon called as a witness on behalf of the Plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CENICEROS:
Q Mr. Emrick, how are you employed?

A I am employed by the U. S. National Bank.
Q And what is your function with the U. S. Bank?
A A trust officer.
Q And in your capacity as trust officer, you handle the Oregon - Washington Carpenters - Employers trust funds, the various funds.
A Yes.
Q They are the Health and Welfare, Pension, Vacation, Apprenticeship Training, and in this case the C.I.A.F., Construction Industry Advancement Fund.
A Yes.

* * * * *

[Tr. 146-147]

CROSS EXAMINATION

BY MR. NEIL:

Q Mr. Emrick, you are the administrator of these trusts; is that not technically your title?
A That's right.
Q Do the trusts accept contributions from non-union employers directly?
A Anybody who is signatory to the trust funds.
Q In answer to my question, they do not.
A No. The answer is, they have to be signatory to the trust. There is a bargaining agreement.
Q Is there a method, however, by which non-union contractors' employees, their fringe benefits can be paid into the trust fund even though the non-union contractor is not a signatory?
A No, because they must be signatory to an agreement in order to participate under the trust.

Q Haven't you seen report forms where the employees for whom the contributions are being made are employees of a non-union sub, but the report is being made in the name of a signatory, a union contractor?
A Well, any report that we have that we would put through would be, as far as the employer is concerned— The name appearing on the report form we would check, and that has to be a signatory. Our instructions are strictly to process only signatory employer reports.
Q Okay. I understand that, but are you aware that some of the employees are, in fact, non-union contractor employees who are being treated as signatory employees for purposes of reporting?
A Well, we wouldn't know whether they are union or non-union necessarily.
Q You don't. Okay.
A Because we don't have that facility.

* * * * *

[Tr. 149-156]

Q Now turning to these eligibility requirements, we have five trusts here.
A Yes.
Q The first one is the Health and Welfare trust. That's sort of a medical trust; is that right?

MR. CENICEROS: Your Honor, I think I am going to object to this. I don't see the relevance. If he is going to make the payments by the employer on the trusts, conditioned on the eligibility, this is not the suit to do so, and I don't think

that's relevant as a matter of law. What is the eligibility? What does he intend to show by the eligibility here? The only think he can show is that they are not eligible. So what. This is not the forum to determine the reasonableness or the nonreasonableness of eligibility requirements.

MR. NEIL: We went through this before, Your Honor, and I think I laid before you at that time my position that this goes—not that it is of itself a defense but it simply goes to the equitable question of whether it is equitable to require this Defendant to make a payment into this trust when, first of all, the fringes have already been paid by Jackson to his men and, secondly, as I would prove by this witness, the payments will not accomplish any substantial benefit for Jackson's men and simply will amount to a penalty upon Walsh for not doing what the Plaintiffs say he should have done.

MR. CENICEROS: Well, let me respond to that, Your Honor. This is equity, but we don't throw away the rule book in equity. Equity follows the law.

THE COURT: Well, equity also has a maximum for any possible purpose.

MR. CENICEROS: That's true, but still this is not— I would call this just kind of a blatant appeal to sympathy. We regret that Mr. Walsh might have to pay these fringes twice, but this is a situation of his own making, not of ours.

THE COURT: I understand your several po-

sitions. I will permit you to offer this under the rule.

MR. NEIL: Thank you.

Q As to the Health and Welfare trust, which is for medical insurance and that kind of thing, right?

A Right.

Q What are the eligibility requirements for a man to participate in the benefits of that trust?

A Well, he has to acquire an hourly contribution first in order to establish his first eligibility of 250 or more hours in the first three of the last four months preceding a claim. Now, if I may use an example. May I have that opportunity, Your Honor?

THE COURT: Sure.

A January, February, March. Say the man in those three months has worked a total of 250 or more hours. Now his first qualification for eligibility would be— April is a light* month because they report the March hours. Say they were all divisible by 83⅓ hours and made 250 exactly. Then April would be the lag month. Then he would be good for May, June and July. That's one test, which is called the 250 hour test. The second test, 1,000, is because of the pattern of the industry, the employment picture.

Q What is the second test?

A Is 1,000 hours in the first 12 of the last 13 months. So that would— In other words, the same three-month eligibility, but those hours, the composition

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* Reporter's error—word should be "lag."

of them determines whether or not the man is eligible.

Q Must he meet both of those requirements?

A No, just one, and that's why there is two, because the pattern of work many times is seasonal. It gives him the additional protection or the opportunity to qualify.

Q Let's say that the Court in this case ordered or decided this case in a fashion that required the payment of some contributions into the fund, this fund, right now for work done in 1971 and that those contributions were the only contributions for those particular men, no others. Would they be eligible right now for—assuming they met these requirements of 250 hours in a three-month period—

MR. CENICEROS: Your Honor, I object. If you are going to go into a hypothetical, let's bring it down to this case.

MR. NEIL: That's what I'm trying to do.

MR. CENICEROS: It's a little bit more involved than that.

Q (By Mr. Neil) Are you able to say that any contributions ordered into the trust in this case would or would not be a benefit to Mr. Jackson's employees?

A I would have to check the actual eligibility board for the period covered. In other words, we would have to compile the hours if the monies were paid in to see whether the total hours in this given period mentioned would give them 250 hours or more or perhaps some other employers would give them

maybe the 1,000 hours. Many of these employees work for more than one employer in a month.

Q Now just a minute, Mr. Emrick. That's very true, but most of the people you are dealing with are union members, aren't they?

A Yes, the majority are.

Q Let's go to the second fund, the Pension fund. What are the requirements of eligibility for a pension?

A They must have 12 pension credits, meaning that they must have 12 years of pension credit, or for each quarter of a pension credit is 300 hours, or a total of 1200 hours for one full pension credit.

Q So there would have to be a period of 12 years where payments for the employee have to be made.

A It isn't exactly in that fashion, because they get credit for the time they worked prior to the establishment of the fund as long as they have 1200 hours. Now as the calendar moves around from year to year, they naturally get in more service because contributions were effective as of June 1, 1962 and the fund itself was funded to establish and build up the monies. So the first pensions were actually paid in 1963, but as the calendar goes, obviously they get more contributions into the trust.

Q There wouldn't be any credit, however, prior to the effective date of the trust for non-union employees.

A There was no difference with respect to that. The point of it is they could prove employment, and they had about three or four different criteria They could use, like their W-2 tax forms, state-

ments from the employer as to—in other words, an affidavit that the man actually performed the work and it was a carpentry type of work.

Q How about the Vacation fund?

A The Vacation fund?

Q What are the eligibility requirements?

A There is no eligibility requirement. It's whatever contributions are paid in on behalf of the man. He is entitled to those contributions, and there are earnings from the investments. Then it is prorated accordingly by the first dollar in.

Q Must an employee apply for the vacation fund?

A Pardon me?

Q Must he apply?

A No. As long as we have the record of their enrollment card. That is a card which shows the family composition and any— In fact, we even go to the point there of sending—if we have no address for a particular employee, we send it to the various local unions to find out where the man at least has had an address to forward it to him.

Q Do you know whether local unions check addresses of non-union employees for you?

A Well, I wouldn't know that. That's out of our area.

Q The construction industry is not a fund that pays directly to the employee.

A No. That's a lump sum fund.

Q And the Apprenticeship fund does not pay directly to the employee.

A No.

MR. NEIL: That's all.

THE COURT: Anything further?

MR. CENICEROS: Yes.

REDIRECT EXAMINATION

BY MR. CENICEROS:

Q On the Health and Welfare thing, if, far example, this Court were to order the payment of these contributions for a period of 1971 and a claim was made, would that claim be paid?

A If it provided eligibility, yes.

Q If other eligibility requirements were made?

A Right.

Q However, if no contributions were made by the employer and the employee gets nothing—in other words, unless he has built up—

A There must be contributions received.

Q Now do you go to quite a lot of effort to try and find the individuals entitled to the vacation fund?

A Yes.

Q Now on the pension fund the employee has how long a period of time to accrue his eligibility?

A Well, on the pension fund, if he has his pension credits, if he has not yet— There is a period which is called the breaker, which is a three-year period in which the employee must earn what is entitled a quarter of credit in that period of time, and that means 300 hours or more—in other words, they earn multiples of 300—then they can earn as high as a year and a half credit, up to 1800. Five quarters for 1500, six quarters would be 1800 or more hours.

Q Weren't these eligibility requirements for the pension just recently liberalized considerably by the trustees?
A Yes, they were, as of April 1, 1973.
Q And the trustees of these funds are an equal number of management trustees as labor trustees.
A Under the Taft-Hartley, the labor management act.
Q What was your answer?
A The answer is yes.
Q On any of these funds, Health and Welfare, Pension, Vacation, is a beneficiary required to be a union member?
A No.

* * * * *

Testimony of Roy W. Coles

[Tr. 158-159]

ROY W. COLES

was thereupon called as a witness on behalf of the Plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CENICEROS:

Q Mr. Coles, what is your occupation?
A I am the Executive Secretary of the Oregon State Council of Carpenters.
Q Were you in that position in 1971?
A Yes, I was.
Q I would like to clarify a few things about the eligibility requirements on the Health and Welfare.

MR. CENICEROS: I would bring this under

a counter offer of proof, not waiving.

THE COURT: Okay.

Q (By Mr. Ceniceros) Mr. Emrick testified that the primary requirement was 250 hours for which contributions were paid; is that correct?
A That's correct.
Q Now assume that 250 hours were accrued in one or more months in 1971, no contributions were made. If the contributions were later collected as a result of a lawsuit or paid for some reason or other, would an individual who earned these hours be compensated for a medical claim?
A Yes, during the period that he was eligible. Then that would be decided at the Administrator's office.
Q This would be the case though at the time he had not made a claim against the trust fund.
A That's correct.
Q Even though he made a claim two years later.
A With substantiated evidence of a claim.
Q Medical evidence.
A Right.

* * * * *

[Tr. 163-164]

Q That was another matter. All right. Now, Mr. Coles, the Defendant has raised a defense of delay. The job ended pretty much undisputed in November of 1971, and the first demand letter to Mr. Walsh—formal demand letter from Mr. Bailey to which he has testified went out in November 1972, a period of about a year delay. Is there any explanation for that delay?

A Yes, there is. Mr. Kirkland and Mr. Stanfill, representing the Mid-Pacific Portland District Council or District of Building Trades, and Stanfill, the Oregon State Building Trades Council, having personal knowledge of all the implications about our problems and being more quite well acquainted with Mr. Walsh, indicated to me that they were discussing— continuing to discuss this problem with him, and there was a good possibility that there would be some settlement, a resolve to the dispute.

Q And when did you finally conclude that no settlement was forthcoming?

A Quite apparent it was in the Fall of '72.

Q Now are you also a member of the Delinquency Committee?

A That's correct.

Q Now what is the function of the Delinquency Committee?

A When delinquency matters are brought to the attention of the trustees by the administrator's office, they are acted on seriatim. The Delinquency Committee makes a decision as to how they will be processed, and most generally an audit is requested of the books. If no response from the employer up to that point, most likely co-legal counsel are asked to intervene. And in some cases it goes to court.

Q Who are the legal counsel?

A The first firm is Baily, Doblie & Ceniceros. The second party I only know Mr. John Hill.

Q Is the Delinquency Committee composed of an equal

number of management as well as labor trustees?

A That is correct.

Q And was this case considered by them?

A Yes, it was.

Q And obviously as a result after this consideration it was referred to co-legal counsel.

A That's correct.

* * * * *

[Tr. 166]

CROSS EXAMINATION

BY MR. NEIL:

* * * * *

Q Is it true, Mr. Coles, that the trust funds would not accept payments directly from a non-union contractor such as Jackson?

A That's correct.

Q And the only way they will accept payments is by having him make the payments through a union contractor such as Tom Walsh & Co.

A That's correct.

* * * * *

[Tr. 167]

Q Well, I don't find it in your deposition. If your counsel knows where it is, he can point it out to me. Were you even aware at the time of these meetings that Jackson was paying for these men?

A No, I wasn't.

Q To elude to my previous question again I want to ask you, were any demands made upon Walsh in meetings in which you were present that he must

pay into the trust funds?

A Yes, there was.

* * * * *

[Tr. 168]

A Your question was, "But you would have accepted him if Walsh had paid them even though Jackson was not a union sub; is that correct?" I said, "That's right."

* * * * *

[Tr. 172-175]

Q I believe you testified that the trust delinquency committee made the determination as to whether or not to bring suit for any particular contributions. Is there an earlier determination made at the union level?

A Yes, there is.

Q And by whom at the union level?

A The matter is referred to the trustees on the delinquency committee.

Q In other words, the carpenters union involved could decide they don't want to pursue this matter and, therefore, not request the delinquency committee of the trust to take action; is that right?

A Would you restate that, please?

Q I am asking if the union decided they didn't want to pursue a matter involving trust contributions, they could simply decide not to do so and not to request the Delinquency Committee of the trust not to pursue it, and by not requesting it, it won't get pursued; is that correct?

A That works both ways, with the employers' side

also.

Q So there is really two parties deciding whether to pursue a particular matter, one is the union; and assuming they want to pursue it, then the Delinquency Committee has to decide it.

A That's correct.

Q You mentioned the Delinquency Committee considering this matter. When did they consider that?

A I don't have that. I am sure the administrator could find those records there. They are all in minutes.

Q Would it have been shortly prior to the lawsuit being commenced?

A I don't recall when the first action was taken in the Delinquency Committee.

Q Did you sit on the Delinquency Committee?

A Yes. If I had the minutes, I could recall.

MR. NEIL: Nothing further.

REDIRECT EXAMINATION

BY MR. CENICEROS:

Q Mr. Coles, would you turn to Page 13 of your deposition. On cross examination, counsel referred you to Page 11, asking you if any demand had been made on Tom Walsh. Were you not also asked on Page 13, by Mr. Neil: "QUESTION: And it's your recollection that the main subject of discussion was just that Walsh ought to pay into the trust fund for Jackson's men; is that right? ANSWER: Under the terms of our agreement, yes. QUESTION: And was command* made upon him to do so? AN-

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* Reporter's error—word should be "demand."

SWER: I would say it was requested he take care of his obligation. QUESTION: What was it phrased? That, Walsh, you ought to begin making payments to the trust fund for Jackson's men? ANSWER: Possibly not in those exact words. He had no other reason to meet with Tom Walsh." Do you recall making that testimony?

A Yes, I do.

Q Now, Mr. Coles, the final say on whether legal action is brought is by the Delinquency Committee, is it not?

A Correct.

Q If the union decides they don't want to puursue it and the Delinquency Committee says pursue it, the matter is pursued, is it not?

A Most generally, yes.

Q Now in addition to the matter being referred to co-legal counsel for processing, isn't it another step that each member of the Delinquency Committee sign a request, an authorization for legal action?

A That's correct.

Q And that procedure was followed here.

A That's correct.

Q So it's a two-step process. First the decision to refer to counsel, and then counsel refers it back to the Delinquency Committee if it needs to go to suit. The Delinquency Committee then in writing, every member signing, authorizes it.

A One from each side signs the authorization.

* * * * *

[Tr. 179-180]

Q Mr. Coles, I show you what has been marked as Plaintiffs' Exhibit 9, which are copies of a document entitled Authorization for Legal Action. Would you identify those to the Court, what they are.

A This is the Authorization for Legal Action—do you want me to read it?

Q Just generally what they are.

A It's an authorization to take action against a contractor deemed delinquent. This is not my signature as the trustee that invoked this authorization.

Q Those are copies, but how many members of the Delinquency Committee do those represent?

A This happens to be the signature of another member of the Delinquency Committee that signed this authorization, Mr. Hansen.

Q And one was signed by Mr. Carl Halvorson. This was on September 16th.

* * * * *

[Tr. 180-181]

Q And another was signed by—which trustee was that?

A That's Carl M. Halvorson.

Q September 16, 1972; is that correct?

A That's right.

Q And another was signed by yourself September 19, 1972; is that right?

A That's right.

Q And another was signed September 18, 1972, by Swan Nelson.

A That's correct.

Q And Ralph who?
A Ralph Mergen, Associated General Contractors, as trustee.

* * * * *

Testimony of Thomas J. Walsh, Jr.
(Recalled)

[Tr. 214-215]

Q You have already testified, I believe, that you were not told at either the June 21st or June 30 meeting, or any other meeting during the job, that the fringes for Jackson's men could be paid to the trust via yourself as a signatory, Tom Walsh & Co. as a signatory to the agreement; is that correct?
A That is correct.
Q Did you know that at the time?
A No.
Q When did you first learn that the union would accept contributions to the trust in that fashion from non-union employers?
A Oh, some substantial time after this litigation started it came out during that.
Q By reading one of the depositions taken in this case?
A Yes.
Q Had you known that at the time of the job, June 21st and on, would you have taken any different course of conduct with respect to the fringes than was taken? That is, Jackson paid his men direct.
A Yes. I would have made arrangements with Jackson had I known what I know now. The payment of that fringe benefit into the trust for the benefit

of the men would have satisfied Davis-Bacon. It would have certainly satisfied our requirements under HUD. It would have kept everybody happy, and there would have been no additional costs. Everybody would have agreed. We are talking about the same per hour fringe benefit cost, and the difference was solely, did it go to the men in cash or did it go to an approved benefit program for the men?
Q How could you have arranged that with Jackson?
A We could have done it one of two ways. Either that we would have withheld from the amounts we were paying him under his subcontract, prepared the reports ourselves and filed them with the trusts and then show a deduct on the reconciliation of the Lloyd subcontract, or we could have had Lloyd prepare the reports, send them to us with his check for our adding our name as the signatory to the agreement at the bottom.

* * * * *

[Tr. 220-221]

Q Getting back, if you would have been told about this, as you claim you were not, you would have had to tell them either, No. 1, pay with a Tom Walsh & Co. check because that was the only signatory, or you couldn't have paid at all because Lloyd Jackson couldn't pay; and according to your position now, Tom Walsh 4, Oreg. Ltd., is not bound by the labor agreement, and they couldn't accept a check from him either.
A You are saying that they couldn't accept a check.

I don't know that, certainly didn't know it. What I am saying is—and maybe you can ask me some more questions and I could make it clear—had we known, had we been advised that that trust fund for non-union employees constituted a bona fide benefit program, there was absolutely no cost disadvantage to using it. It was both a viable and a very attractive alternative. We would have used it. I can't see that the mechanics would have been all that difficult. If it automatically came to this, if they would not accept Jackson's check, the TW4 check, if they would have only accepted a Tom Walsh & Co. check, then Tom Walsh & Co. would have billed Tom Walsh 4 for that amount, then reimbursed by Tom Walsh 4 and then issued a Tom Walsh & Co. check, if that was the only way to make the payment. Had I known about it, I would have gotten the problem solved.

* * * * *

PLAINTIFFS' EXHIBIT 1

MEMORANDUM AGREEMENT

It is agreed between the undersigned,
TOM WALSH AND CO.

hereinafter called "Employer", and the Oregon State Council of Carpenters; Southwest Washington District Council of Carpenters; Portland and Vicinity District Council of Carpenters and Piledrivers, Bridge, Dock and Wharf Builders of the United Brotherhood of Carpenters and Joiners of America, hereinafter called "Union", in consideration of services performed and to be performed by carpenters for the Employer as follows:

1. The Employer agrees to comply with all the terms including wages, hours, and working conditions and rules set forth in the Carpenters Master Labor Agreement for Oregon and Southwest Washington dated May 1, 1968 (herein Master Agreement), and the agreements establishing: (a) the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund, dated January 1, 1956 as amended November 5, 1956 and August 1, 1968; (b) the Oregon-Washington Carpenters-Employers Pension Fund, dated December 19, 1962 as amended August 1, 1968; (c) the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund, dated December 28, 1965 as amended August 1, 1968; (d) the Oregon-Washington Carpenters-Employers Vacation Saving Trust Fund, dated August 1, 1968; the Con-

struction Industry Advancement Fund, (dated June 1, 1967) and any amendments, modifications, extensions, supplementations and renewals of the Master Agreement and the Trust Agreements and any agreements establishing other benefits or plans negotiated by the parties signatory to the Master Agreement. The Master Agreement and the Trust Agreements are attached hereto, and, except as to such terms as are specifically excluded by this Memorandum Agreement, are hereby specifically incorporated by reference and made a part of this Memorandum Agreement as though set out in full herein.

2. The employer agrees to pay to the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund, the Oregon-Washington Carpenters-Employers Pension Trust Fund, the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund, the Oregon-Washington Carpenters-Employers Vacation Savings Trust Fund, and the Construction Industry Advancement Fund, the sums in the amounts and manner provided for in the Master Agreement and the Trust Agreements and the rules and procedures adopted by the Trustees of the Trust Funds and all amendments, modifications, extensions, supplementations, and renewals thereto.

3. The Employer agrees that he does irrevocably designate and appoint the Employers mentioned in the Oregon-Washington Carpenters Health and Welfare Trust Agreement, the Oregon-Washington Carpenters-Employers Pension Trust Agreement, the Oregon-Washington Carpenters-Employers Apprentice-

ship and Training Trust Agreement, the Oregon-Washington Carpenters-Employers Vacation Savings Trust Agreement, and the Construction Industry Advancement Fund, as his attorneys-in-fact for the selection, removal, and substitution of Trustees as provided by or pursuant to the Master Agreement or Trust Agreements.

4. It is agreed that all provisions in the Master Agreement covering or relating to the subject of strikes, lockout, jurisdictional disputes and procedure of settlement of grievances and disputes shall be excluded from this Memorandum Agreement and shall not be binding upon the Employer or the Union. It is agreed that in all cases of a claimed violation, misunderstanding, dispute or difference regarding the application or interpretation of this Memorandum Agreement or the Master Agreement or the Trust Agreements, or any amendments, modifications, extensions, supplementations and renewals thereto, the Union shall have the right to call or engage or assist in a strike, shutdown, work stoppage or withdrawal of services and the Employer shall have the right to engage in a lockout. The provisions of this paragraph shall not apply to the enforcement of the terms of Paragraph 5 of this Memorandum Agreement or to the applicable subcontracting provisions of the Master Agreement except to the extent permitted by law.

5. If the Employer contracts or subcontracts any work covered by this agreement to be done at the jobsite of the construction, alteration or repair of a building, structure or other work to any person or propri-

etor who is not signatory to this Memorandum Agreement or the Master Agreement, the Employer shall require such subcontractor to be bound to all the legally enforceable provisions of this Memorandum Agreement and the Master Agreement, or the Employer shall be responsible and liable for the payment of all sums of money required by all terms of said Agreements, and which would be owed by the subcontractor were the subcontractor bound by the legally enforceable provisions of said Agreements.

6. This Memorandum Agreement shall be binding upon the heirs, executors, administrators, purchasers, and assigns of the Employer and shall be binding upon the Employer regardless of a change of entity, name or association or joint venture and shall bind any entity or venture who is a principal, associated with the Employer. If the Employer is a corporation, or other business entity other than an individual, the individual signing this agreement on behalf of the Employer acknowledges that his signature binds himself individually as well as the corporation or other business entity.

7. This Memorandum Agreement shall remain in full force and effect until May 31, 1971 and shall continue from year to year thereafter unless either party shall give written notice to the other of a desire to change or cancel it at least sixty days prior to May 31, 1971, or May 31 of any succeeding year. The Employer and the Unions shall be bound by any renewals or extensions of the Master Agreement and the Trust Agreements, or any new agreements, unless an

appropriate written notice is given to the other party at least sixty days prior to May 31, 1971, or any subsequent year of their intent not to be bound by any new, renewed or extended agreement.

Signed this 22 day of September, 1969.

UNION:

District Council of Carpenters of Portland & Vicinity

/s/ *Swan Nelson*
Authorized Signature

EMPLOYER:

TOM WALSH AND CO.
Address: 2839 S. W. 2nd
Town: Portland, Oregon
Telephone No.: 222-4375

/s/ *T. J. Walsh*
Authorized Signature

PLAINTIFFS' EXHIBIT 7

CARPENTERS
MASTER
LABOR AGREEMENT

THIS AGREEMENT, made and entered into this first day of June, 1971.

Between

OREGON-COLUMBIA CHAPTER
THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.
EUGENE CONTRACTORS ASSOCIATION
ACOUSTICAL CONTRACTORS ASSOCIATION
OF OREGON, INC.

and

OREGON STATE COUNCIL
SOUTHWEST WASHINGTON DISTRICT
COUNCIL
of the
UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

DEFINITIONS

A. The term "Association" as used herein shall mean the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Eugene Contractors Association, Acoustical Contractors Association of Oregon, Inc. A list of members is set forth in Schedule "B" or any supplements thereto.

B. The term "Employer" as used herein shall mean any individual, partnership, firm or corporation signatory, or who becomes signatory, to this Labor Agreement.

C. The term "Union" as used herein shall mean the Oregon State Council and Southwest Washington District Council of the United Brotherhood of Carpenters and Joiners of America, acting for all of their local Unions, as set forth in Schedule "C" attached hereto.

Purposes of This Agreement

The purposes of this Agreement are to promote the settlement of labor disagreements by conference, to prevent strikes and lockouts, to stabilize conditions in all types of construction in the area affected by this Agreement, to prevent avoidable delays and expense, and generally encourage a spirit of helpful cooperation between employer and employee groups to their mutual advantage.

ARTICLES OF AGREEMENT

Article I

TERRITORY

This Agreement shall cover the entire State of Oregon, and the following area of the State of Washington: The counties of Klickitat, Skamania, Clark, Cowlitz, Wahkiakum and that portion of Pacific County south of a straight line made by extending the

north boundary line of Wahkiakum County west to the Pacific Ocean.

Article II
Work Affected

Section 1. This Agreement shall govern all types of construction work coming within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America as recognized by the AFL-CIO Building and Construction Trades Department.

Section 2. To clarify the scope of this Labor Agreement, and to thereby avoid future misunderstanding, utilities, highway and heavy construction work is defined as including, but not limited to the following: Construction and reconstruction of roads, streets, highways, alleys, sidewalks, guard rails, fences, parkways, parking areas, athletic fields, airports, railroads, street railways, bridges, overpasses, underpasses, grade separations, grade crossings, track elevations, elevated highways, sewers, water mains, foundations, piledriving, sanitation projects, reservoirs, dams, dikes, levees, revetments, channels, aqueducts, channel cutoffs, jetties, breakwaters, harbor developments, docks, piers, abutments, retaining walls, transmission lines, pipelines, duct lines, subways, shafts, tunnels, excavation of earth and rock, clearing and grubbing, land leveling, quarrying, industrial plant construction other than building construction as defined below; including operation, maintenance and repair of land and floating plant equipment, vehicles and other facilities used in connection with the de-

scribed work and service, and all other work of similar nature.

Building construction work shall cover, but *not* be limited to, the construction of residential, commercial or industrial structures, and the on site work necessary for assembly, erection and installation of facilities and equipment in or on such structures, including any and all modifications, additions and repairs thereto.

It is mutually understood and agreed that this Section 2 becomes null and void immediately upon the Association effecting the deletion of similar work definitions from all other labor agreements negotiated by the Association.

Section 3. The terms of this Agreement shall also apply to that work performed at temporary facilities, such as fabrication yards and/or assembly plants located at or adjacent to the construction site, which are integrated with and set up for, the purpose of servicing the construction project or projects; rather than to serve the public generally.

Section 4. See Carpenters, Millwrights, Piledrivers Schedules "A" for the appropriate wage rates and character of work.

Section 5. Craft jurisdiction is neither determined nor awarded by classifications and/or scope of work appearing in this labor Agreement.

Article III
Effective Date — Duration — Modification

Section 1. When executed by the parties hereto, the terms of this Agreement shall become effective as of June 1, 1971, and shall remain in full force and effect until and including May 31, 1973, and thereafter as provided in this Article.

Section 2. Any party hereto desiring termination, modification or changes in this Agreement to take effect subsequent to May 31, 1973, or to take effect for any agreement year subsequent to May 31, 1973, shall serve written notice on the other party at interest on or before March 1, prior to the end of each such agreement year, requesting negotiation.

If no such notice is given, this Agreement shall continue in full force and effect from year to year.

Article IV
Subcontractors Clause

If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pen-

sion, Vacation, Apprenticeship and CIAF contribution in accordance with this Agreement.

The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor, and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)

No work will be let by piecework, contract or lump sum direct with a journeyman, apprentice or trainee for labor services.

NOTE: See Article V, Section 4(e), Pre-Job Conference.

* * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-906

THOMAS J. WALSH, JR.,
d/b/a TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION

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January 19, 1976

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-906

THOMAS J. WALSH, JR.,
d/b/a TOM WALSH & CO., Petitioner,

v.

E. A. SCHLECHT, et al.,
as Trustees of Five
Oregon-Washington Car-
penters-Employers Trust
Funds, Respondents.

On Petition for A Writ of Certiorari
To The
Supreme Court of Oregon

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents oppose the Petition for Writ of Certiorari to The Supreme Court of Oregon requested by petitioner.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011 (App. of Petition).

JURISDICTION

The jurisdictional requirement under 28 U.S.C. §1257(3) has not been complied with by petitioner for the reasons set-forth under "Argument".

QUESTION PRESENTED

Does a subcontractors' clause in a labor agreement in the construction industry which requires a general contractor to pay fringe benefit contributions to trust funds on behalf of employees of a non-contributing subcontractor working at the general contractor's job sit violate §§ 302 of the Labor Management Relations Act of 1947 (29 U.S.C. §186)?

STATUTE INVOLVED

The pertinent provisions of 29 U.S.C. §186(c)(5) are set forth in the Petition at pp. 3-6.

STATEMENT

The litigation concerns the requested enforcement of a labor-management agreement

by employer-employee trustees requiring fringe benefit payments from petitioner to respondents.

Petitioner is a general contractor in the building-construction industry and was engaged in constructing a housing project known as"Oak Hill, Salem, Oregon." (Tr. 17-21, 112; Pl. Ex. 3) Petitioner was a signatory party to a labor agreement (P. Ex. 4) which provided, inter alia, that if he subcontracted carpenters' work covered by the agreement, he would do so only with subcontractors who were also bound by the terms of the carpenters' labor agreement or, in the alternative, he would be liable "for payment of these employees' wages, travel, Health & Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with the Agreement." (P. Ex. 4, Article IV, App. A)

Prior to petitioner's commencing

work on the Oak Hill project, a pre-job conference was conducted between petitioner and representatives of unions representing employees who were reasonably expected to be employed on petitioner's Oak Hill ("HUD") project. These included carpenters' representatives who, at the pre-job conference (Tr. 82-83), notified petitioner that his subcontractor, Jackson, who was to do carpentry work on the project, was not bound to the carpenters labor agreement and that he would be responsible for payment of subcontractor Jackson's employees' contributions due the respective trust funds, as required by the labor agreement. (P. Ex. 4; Tr. 80-89; App. li of Petition)

By the terms of the respective trust agreements an "employer" is defined as follows:

> "Article I
> * * *
> "Section 5. Individual Employer:
> "An employer who is required by the Collective Bargaining Agreement to make contributions to the Fund, and Union and Local Unions who employ employee-members."

Jackson, not being "required by the Collective Bargaining Agreement to make contributions ...", made no payments to the trust funds for fringe benefits for his carpenter employees and paid an amount equal thereto directly to them. Petitioner did not "maintain daily records of the sub-contractors' (Jackson's) employees job site hours" (P. Ex. 4, Article IV, App. A) nor make payment to respondents. Respondents brought this suit to compel petitioner to pay such fringe benefits.

The trial court concluded that the labor contract required defendant (petitioner) to make fringe benefit payments to plaintiffs (respondents) but held that it would be "inequitable" to require payments to three of the funds (Health and Welfare, Pension and Vacation) and ordered payment

to the other two funds. (App. 1b of Petition)

On appeal, the Oregon Supreme Court held that the trial court had no authority for "equitable reasons" to deny relief to the union (Trustees) in three of the five cases and reversed those three cases and affirmed the judgments entered in the other two cases.

ARGUMENT

I.
JURISDICTION

(1) The question relating to an employee's eligibility to receive benefits from trust funds, authorized by 29 U.S.C. §186(c)(5), was not properly raised by petitioner with the Oregon Courts as required by 28 U.S.C. §1257(3).

(2) Petitioner, who is not a claimant of benefits from the trust funds, is not in a position to raise the issue of legality of eligibility for benefits.

Petitioner argues that employees

of its subcontractor are legally ineligible to obtain benefits from the trust funds and therefore the subcontractors' clause is violative of 29 U.S.C. §186((c)(5).

No claimant of benefits from the trust funds is a party to these proceedings; and, the only contention raised before the trial court and the Oregon Supreme Court was whether petitioner must pay to the trust funds contributions due for all hours worked by subcontractor Jackson's carpenter employees.

In Moglia v. Geohegan, 403 F.2d 110 (C.A. 2 1968), cert. den. 394 U.S. 919 (1969), claimants for benefits were denied the benefits because there was no written agreement between the employees' employer and the union. The trust fund in question required that there be a written agreement between the employer and the union requiring payment of contributions.

Rittenberry v. Lewis, 238 F.Supp. 506 (E.D. Tenn 1965), and Bolgar v. Lewis, 238 F.Supp. 595 (W.D.Pa. 1960), involved claims for benefits made by employees or former employees in the coal industry.

In Re Typo-Publishers Outside Tape Fund, 478 F.2d 374 (C.A. 2 1973), cert. den. 414 U.S. 1002 (1973), arose out of a proposal of union trustees of the trust fund to require that benefits be paid for hours worked by union members not employed by contributing publishers.

Petitioner, who is not an employee claimant for benefits from the trust funds, is not in a position to raise the issue of legality of benefit payments to the funds; additionally, petitioner did not properly raise the issue of legal eligibility in pleading before the trial and appellate courts.

II.
ARGUMENT
REASONS FOR THE COURT'S DENYING ISSUANCE OF THE WRIT OF CERTIORARI

THE INTERPRETATION OF 29 U.S.C.

§186 BY THE SUPREME COURT OF OREGON IN THIS CASE WAS PROPER AND IN ACCORD WITH TWO DECISIONS OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT AND A U. S. DISTRICT COURT.

The question of an employee's eligibility to receive benefits from the trust funds was not properly raised as an issue before the Supreme Court of Oregon.

Petitioner entered into a collective bargaining agreement requiring him to comply with provisions therein governing wages, hours and working conditions covering his carpenter employees (P. Ex. 4). The agreement further provided under Article IV (App. A) that should petitioner subcontract carpenter work to a non-signatory contractor, he would be legally liable for "payment of these employees' wages, travel, Health and Welfare, Pension, Vacation, Apprentice-

ship and CIAF contributions in accordance with this Agreement". (App. A)

The only issue before the Supreme Court of Oregon in the instant case was whether collection of contributions could be enforced against a contractor for payment for hours worked by his subcontractors' employees,as required under the terms of the written agreement entered into between petitioner and the union (P. Exs. 1 and 4).

Petitioner contends that there is a conflict between the Supreme Court of Oregon's decision entered in this case and the decisions of the U. S. Court of Appeals for the Second Circuit and two U. S. District Court decisions - i.e., Moglia v. Geohegan, supra.; In Re Typo-Publishers Outside Tape Fund, supra.; Rittenberry v. Lewis, supra.; and Bolgar v. Lewis, supra. Each of these cases involve claims for fringe benefits and do not

involve legality of payment of contributions to a 302(c)(5) fund.

The Oregon Court's decision entered in this case is in accord with two decisions of U. S. Court of Appeals for the Second Circuit affirming two district court decisions - Budget Dress Corp. v. Joint Board of Dress and Waistmakers' Union, 198 F.Supp. 4 (D.C. S.D.N.Y. 1961), aff'd. 299 F.2d 936 (C.A. 2 1962), cert. den. 371 U.S. 815 (1962); Minkoff v. Scranton Frocks, Inc., 181 F.Supp. 542 (D.C. S.D.N.Y. 1960), aff'd. without opinion 279 F.2d 115 (C.A. 2 1960).

In Budget, supra., the employer moved to recover contributions paid into a clothing industry trust fund covering the metropolitan area of New York. The collective bargaining agreement provided that if Budget subcontracted work, it would then be required to make payments for the subcontractors' employees - the

same issue raised in the instant case.

Following lengthy proceedings, an arbitration award directed Budget to make payments due the trust funds for hours worked by employees of its subcontractors. District Judge Ryan 1/ in an extensive opinion sustained the award holding:

> "We conclude, as have our colleagues before us, that the statute is in no way concerned with the technical aspects of determining and administering benefits under legitimate plans as defined and made up in accordance with statutory directive (302)(c)(5)(B)) .... So long as the funds are used for the benefit of the employees and not diverted to other uses, the statutory immunity applies to these payments-regardless of whether in a proper case a remedy might lie open to an individual employee against the Trustees of the Fund. No claim is here made that these payments

1/ Chief Judge J. Ryan also issued the district court opinion in Moglia v. Geohegan, supra. Neither in the district court's opinion nor in the second circuit's affirming opinion was any mention made of Budget or Minkoff, supra.

> were not so used."
> 198 F.Supp. at 12

2/ and 3/

2/ Judge Ryan cited with approval Judge Metzner's decision in Minkoff v. Scranton Frocks, supra.:

> "Judge Metzner...had before him precisely the same Funds and type of agreement between the Union and Joint Board. The argument there made was that because some of the contractor's employees had been expelled from the union, they were not eligible for benefits under the Funds and that, consequently, the payments made on their behalf to the Funds were in contravention of the statutory requirement that the payments be for their sole and exclusive benefit .... He further held that denial of benefits, if any, was a matter to be settled between the worker and the Funds and no part of the statutory scheme of Section 302(c)(5), and that 'by no stretch of imagination' could the plans be considered other than legitimate."
> 198 F.Supp. at 11

3/ Judge Ryan also stated in his Opinion:

> "Finally, in Kreindler v. Clarisse Sportwear Co., 184 F.Supp. 182 (1960), a similar contention was made by a manufacturer whose contractors' employees were not unionized.

In affirming Budget Dress, supra., the Second Circuit stated:

> "Appellant seeks to recover monies paid into certain health, welfare and retirement funds on the grounds that payments violated Section 302 of the Labor-Management Relations Act, 29 U.S.C.A. §186. On the basis of Minkoff v. Scranton Frocks, Inc., 181 F.Supp. 542 ... aff'd. per curiam 279 F.2d 115 ... (2 Cir. 1960) and the opinion of Chief Judge Ryan in the present case insofar as it deals with the merits of appellant's claim under Section 302, we affirm." 299 F.2d. 936

III.

DAVIS-BACON ACT IS NOT MATERIAL HEREIN

Work performed by petitioner on the

(3/) The Court, confirming the arbitrator's award, assumed (and it does not appear whether it was contested) that such non-union workers were not eligible for benefits under the Funds but said that, nevertheless, since the payments were of the type contemplated by the statute-for the sole and exclusive benefit of employees-there was no need that they be set up by each employer for his own particular employees." 198 F.Supp. at 12

Oak Hill project was subject to the provisions of the Davis-Bacon Act (40 U.S.C. §276(a)); however, the purpose of the Davis-Bacon Act is to require an employer to pay no less than the prevailing wage and fringe benefits as established by the Secretary of Labor - admittedly the same rate and fringes established by the Carpenters Master Labor Agreement (P. Ex. 4).

While it is true that under the terms of the labor agreement a non-signatory subcontractor cannot pay to the trust funds, the labor agreement requires that petitioner pay for hours worked by the subcontractor's employees, i.e., the same requirement that Budget, supra., enforced.

Petitioner was advised that he must comply with the terms of the labor agreement and pay fringe benefits for hours worked by Jackson's employees. (App. 1h-1i of Petition). It was petitioner's choice

not to make the fringe benefit payments to the trust funds. Petitioner could have avoided double payment by withholding from Jackson the sum necessary to cover these contributions. The decision of the Oregon Court upholding petitioner's contractual obligation does not require double payment by a contractor contracting with a non-union subcontractor. Prevailing fringe benefits paid into a trust fund satisfies the Davis-Bacon Act. A contractor with a governmental agency has the responsibility to assure these fringe benefit payments are made and it is immaterial under the provisions of the Act who pays. (40 U.S.C. 276a)

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Respondents acknowledge that a majority of collective bargaining agreements in the construction industry provide for subcontractors' clauses. Such clauses are

permitted by 29 U.S.C. §158(e). Congress specifically exempted the construction industry from the prohibition against secondary boycotts by enacting §158(e). Congress similarly excluded the clothing industry from certain prohibited secondary boycott acts.

Contrary to petitioner's statement that the decision of the Supreme Court of Oregon appears to be the first decision sustaining the validity of the type of subcontractors' clause referred to herein, the Second Circuit decisions in Budget and Minkoff, supra., determined the validity and enforceability of subcontractor clauses. Respondents' search of the cases discloses no holding which conflicts with these cases. It appears to respondents that the construction industry has accepted the Second Circuit Court's decisions (the same interpretation as the Oregon court) and therefore no important federal question

now exists.

Petitioner's reference to Connell Construction v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 44 L.Ed. 2d 418 (1975), is not material to review of the issues raised in this case. Connell involved a claimed violation of the Sherman Anti-Trust Act. 15 U.S.C. 1 and 2 - An issue not raised herein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL T. BAILEY
BAILEY, DOBLIE & BRUUN
2308 First National Bank Tower
Portland, Oregon 97201
Counsel for Respondents

Dated at Portland,
Oregon this 19th day
of January, 1976.

APPENDIX

Article IV
of the
Carpenters Master Labor Agreement

"Sub-Contractors Clause

"If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such sub-contractor to be bound to all the provisions of this Agreement, or such contractor shall maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement.

"The Union agrees to notify the contractor, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions owed by the sub-contractor, and to further issue a certificate to the contractor when these payments have been made. (Clarification: With respect to fringes the 30 day period starts

on the day after the report is due to the trust administrator."

75-906

In the Supreme Court

of the United States

October Term, 1975

No. [illegible]

THOMAS J. WALSH, JR.
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT et al., as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

BRIEF OF PETITIONER

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v.

E. A. SCHLECHT et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,

Respondents.

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011.[1] It is also set forth in Appendix B to this brief.

[1] A single judgment and opinion was rendered by the Supreme Court of Oregon in the five cases, which had been consolidated for trial and all subsequent proceedings. The Respondents are all of the trustees (plaintiffs below) in each of the five cases. Petitioner was the sole defendant below in each of the cases.

JURISDICTION

The Supreme Court of Oregon in this case rejected a defense claimed by Petitioner under § 302 of the Labor-Management Relations Act of 1947, as amended (28 U.S.C. § 186). This Court has jurisdiction under 28 U.S.C. 1257(3) to review the judgment of the Supreme Court of Oregon by writ of certiorari.

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. The Petition for Certiorari was filed December 24, 1975, and granted by this Court on March 1, 1976.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are § 302 of the Labor-Management Relations Act of 1947, as amended, now codified as 29 U.S.C. § 186. The full text of § 186 is set forth in Appendix "A" to this brief. The portions of it directly in point appear below.

> (a) It shall be unlawful for any employer or association of employers . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -----
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> . . . .
>
> (c) The provisions of this section shall not be applicable . . . (5) with respect to money or

> other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families, and dependents, (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . ; (6) with respect to money or other thing of value by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; . . . .

QUESTION PRESENTED

Does a Subcontractors Clause in a labor agreement, as applied to require a signatory employer to pay trust fund contributions on behalf of employees of a non-

union subcontractor who does not contribute to the trusts, violate § 302(c)(5) of the Labor Management Relations Act of 1947 (29 U.S.C. § 186(c)(5)), which prohibits employer contributions to trust funds unless they are established for the sole and exclusive benefit of employees (and certain relatives) of the contributing employer and employees (and certain relatives) "of other employers making similar payments?"

STATEMENT OF THE CASE

Petitioner builds and operates multiple-unit housing projects. He became the general partner in Tom Walsh 4, Oreg. Ltd., a limited partnership organized in 1971 to construct, own and operate a 56-unit, low income apartment project known as Oak Hill, in Salem, Oregon (A. 18-22; P. Ex. 3).

The Oak Hill project was financed and built under a subsidized rental program administered by the United States Department of Housing and Urban Development (HUD). Agreements with HUD required that employers on the project pay their workmen the prevailing "wages," including the cost of so-called fringe benefits, as provided in the Davis-Bacon Act, 40 U.S.C. § 276a (A. 26, 43).

The limited partnership acted as its own general contractor in constructing the Oak Hill project. It subcontracted the specialized carpentry work of framing the buildings to Lloyd Jackson (A. 24-25; D. Ex. B). Jackson's work was performed and the Oak Hill

project constructed in a 5-month period, June through November, 1971 (A. 44-45).

Jackson was a non-union employer (A. 43). Petitioner, however, was a signatory to a 1969 Memorandum Agreement with the Carpenters Union (P. Ex. 1, A. 73). It bound Petitioner, as an employer, to the terms of a collective bargaining contract called the Carpenters Master Labor Agreement between the Union and several employer associations (P. Ex. 4, 7), and to the terms of five Trust Agreements (P. Ex. 4). The Master Agreement requires signatory employers to pay a total of 96¢ per hour worked by carpenter employees into the five separate trust funds. (P. Ex. 7, 8).

Three of the trust funds (the Health and Welfare, Pension and Vacation Trusts) provide direct benefits to beneficiary workmen (A. 55-60; P. Ex. 4). A fourth trust supports apprenticeship training. The fifth trust, known as the Construction Industry Advancement Fund (CIAF), promotes the interests of the construction industry, generally (P. Ex. 4).

The Carpenters Master Labor Agreement in force during the 1971 construction of Oak Hill (P. Ex. 7, A. 78) contained as Article IV a Subcontractors Clause providing:

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the

employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement . . ."

Apparently relying on Paragraph 6 of the Memorandum Agreement signed by Petitioner (P. Ex. 1, A. 73),[2] the trial court treated Jackson's subcontract with the limited partnership as amounting to the same thing, for purposes of the Subcontractors Clause, as if Petitioner himself had contracted with Jackson (Finding of Fact 4, Conclusion of Law 1, A. 15, 16).

The Davis-Bacon Act, 40 U.S.C. § 276a, authorizes employers to pay certain so-called fringe benefits either to union-employer trusts for the benefit of workmen or directly to the workmen. Since Jackson was not a signatory to any collective bargaining contract or other agreement providing for him to pay contributions to the carpenters trusts funds, he did not make any payments for the benefit of his carpenter employees into the trusts (A. 49).[3] It is stipulated that

[2] That Paragraph provides in part:
"6. This Memorandum Agreement shall be binding on . . . the Employer regardless of a change of entity, name or association or joint venture and shall bind any entity or venture who is a principal, associated with the Employer. . . ."

[3] It is agreed that the trusts funds will not accept payments from an employer known not to be a signatory to any agreement requiring such contributions to the trusts. (A. 53, 54-55). As noted later, it would be a violation of § 302(c)(5)(B) for a union-employer trust to accept payments from an employer who is not a party to a written agreement providing for such contributions.

Jackson, instead, paid directly to his carpenter employees on the Oak Hill job an additional 96¢ per hour, equaling the amount which a union employer would have been required to pay to the Carpenters Trust Funds for the same work (A. 50).

More than a year after completion of the Oak Hill construction job, the Respondent Trustees of the five Carpenters Trust Funds commenced this litigation in the Circuit Court of Multnomah County, Oregon. Their complaints sought an accounting and a decree requiring Petitioner to pay contributions of 96¢ per hour, as specified in the Carpenters Master Labor Agreement, into the five Trust Funds for all hours worked on the Oak Hill job by Jackson's non-union carpenter employees (A. 4). The total contributions allegedly due to all five Trusts for the hours of these workmen on the Oak Hill project is $6,172.70, exclusive of penalties, interest and attorneys' fees (P. Ex. 8).

Since Jackson had already been paid for his subcontract work a fixed price which included the wages and fringe benefits paid by him to his non-union carpenter employees, the Trustees sought, in effect to impose upon Petitioner in this litigation liability for a second payment of the fringe benefit amounts already paid by Jackson directly to his workmen.

Petitioner's answer pleaded an affirmative defense

that the Subcontractors Clause of the Carpenters Master Labor Agreement violates 29 U.S.C. § 186, if interpreted and applied to require Petitioner to pay contributions to the Carpenters Trusts for the benefit of Jackson's employees (A. 12). The trial court sustained demurrers of the Respondent trustees to this defense (A. 14).

After the five consolidated cases were tried on other issues, the Circuit Court held that Petitioner was obligated by the terms of the Subcontractors Clause to make contributions of the benefit of Jackson's carpenter employees to the five Carpenters Trusts (A. 15). The Circuit Court, however, declined to require "double payment" by Petitioner in the form of contributions to the three Trust Funds which provide direct benefits to workmen, and entered a decree requiring Petitioner to contribute only to the Apprenticeship and CIAF Funds (A. 17).

The Trustees appealed to the Oregon Supreme Court from the Circuit Court's refusal to require contributions by Petitioner to the three direct-benefit Funds. Petitioner cross-appealed from the ruling of the Circuit Court which sustained the demurrers of the Trustees to his affirmative defense based on 29 U.S.C. § 186.

The Supreme Court of Oregon reversed the Circuit Court's refusal to require Petitioner to make contributions for Jackson's employees to the three direct-benefit funds. It also rejected Petitioner's cross-appeal, specifically holding that enforcement of the Subcon-

tractors Clause by requiring Petitioner to make contributions for the carpenter employees of the subcontractor Jackson to the five Trust Funds does not violate 29 U.S.C. § 186 (540 P.2d at 1014-1016; pp. 34-37, *infra*) .

Unless reversed by this Court, the Oregon Supreme Court's decision requires Petitioner to make contributions to all five Carpenters Trust Funds on behalf of the non-union carpenter employees of Jackson, the subcontractor, and to pay additional penalties, interest and attorney's fees.

SUMMARY OF ARGUMENT

The Subcontractors Clause of the Carpenters Master Labor Agreement, as construed and applied below, obligates Petitioner and other employers bound by it to make contributions to the Trust Funds on behalf of employees of non-contributing employers, and thereby conflicts with the requirement of § 302 (c) (5) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 186(c) (5)) that such contributions must be for the benefit of employees of the contributing employer or of such employees jointly with the employees of "other employers making similar contributions." Lloyd Jackson was not an employer making similar contributions to the Carpenters Trust Funds. Enforcement of the Clause to require Petitioner to contribute to the Funds for the benefit of Jackson's employees therefore requires acts in violation of § 302.

The Subcontractors Clause, as so construed and applied in the context of projects subject to the requirements of the Davis-Bacon Act, 29 U.S.C. § 276a, also frustrates the purpose of that Act to prohibit unfair competition through some contractors having the benefit of lower wage rates. Enforcement of the Clause will make the cost of labor more expensive on a Davis-Bacon Act job if a contractor uses a non-union subcontractor than if he subcontracts work to a union employer.

ARGUMENT

A. The Subcontractors Clause, as construed and applied below, requires trust fund contributions which are illegal under § 302(c)(5) of the Labor Management Relations Act of 1947.

The Subcontractors Clause, as construed and applied by the Oregon Supreme Court, permits a labor union to penalize a union general contractor for contracting work to a non-union subcontractor. The penalty is in the form of requiring the general contractor to make payments on behalf of the employees of the non-union subcontractor to union trust funds from which the subcontractor's employees are legally ineligible to benefit.

Imposing a penalty for use of a non-union subcontractor appears to be precisely the intent of the Subcontractors Clause in the Carpenters Master Labor Agreement. Clauses prohibiting a union employer from subcontracting work to a non-union employer are common in the construction industry because of

the proviso in 29 U.S.C. § 158(e) allowing such "hot cargo" agreements in this industry.[4]

A recent survey of collective bargaining agreements in the construction industry found clauses requiring contractors to subcontract work only to union employers in about 75% of the agreements. U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1864, "Contract Clauses in Construction Agreements," p. 25 (1975). Penalizing breach of such clauses by requiring contributions to union trust funds on behalf of non-union employees, however, appears to be somewhat unusual. Only one of many subcontractors clauses examined in a 1969 study contained that type of penalty. U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1425-8, "Major Collective Bargaining Agreements," p. 23 (1969).

The penalty provided in the Subcontractors Clause of the Contractors Master Labor Agreement for use of a non-union subcontractor, however, requires contributions by the signatory employer which violate § 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186. That section prohibits payments by employers to union-employer trusts unless certain conditions are met. One of the requirements stated in § 302(c)(5) for legal payments by an employer to such a trust is that the trust fund must be

> "established by such representative, for the sole and exclusive benefit of the employees of such em-

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[4] *Cf. Connell Construction Co.* v. *Plumbers, Etc. Union*, 421 U.S. 616 (1975), involving such a clause not in a collective bargaining agreement.

ployer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."[5]

When the Subcontractor's Clause is applied to require a union contractor to make payments into the trusts for Jackson's non-union employees, the trusts and such payments are not solely and exclusively for the benefit of Petitioner's employees or for their benefit jointly with the employees of "other employers making similar payments." Jackson made no payments to these trusts for his employees (A. 49-50). The trusts will not accept contributions from any employer not signatory to an agreement requiring contributions to them (A. 53). There is no evidence that Jackson ever contributed to these trusts for any employee, or that any of Jackson's carpenter employees on the Oak Hill job ever worked for Petitioner or any other union employer required by contract to make payments for their benefit into these trusts.

It is clear that § 302(c)(5)(B) prohibited Jackson from paying contributions for his carpenter employees directly into the Carpenters Trust Funds, since he was not a party to any collective bargaining agreement or other written agreement providing for

[5] This requirement is also construed as applicable to § 302(c)(6), added to § 302 by a 1959 amendment. *In re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194, 196 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 74 (C.A. 8, 1965).

such contributions. *Moglia* v. *Geoghegan*, 403 F.2d 110 (C.A. 2, 1968), cert. den. 394 U.S. 919 (1969).

In holding that § 302(c)(5) prohibits payments of benefits to the beneficiaries of a deceased employee whose employer had made contributions to a trust for many years without any written agreement providing for such contributions, the U. S. Court of Appeals for the Second Circuit in *Moglia* stated:

> "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 Trust." (403 F.2d at 116)

Moglia followed two U. S. District Court decisions, *Rittenberry* v. *Lewis*, 238 F. Supp. 506 (E.D. Tenn. 1965), and *Bolgar* v. *Lewis*, 238 F. Supp. 595 (W. D. Pa. 1960), both denying pension fund benefits to former employees for whom the employer had made no contribution to the fund because of first becoming a signatory to the labor agreement after the plaintiff's retirement. After quoting § 302(c)(5), the Court in *Rittenberry* concluded:

> "It is apparent from the foregoing language that the trust [sic] authorized by Section 302 were for the payment of benefits to employees of employers lawfully making contributions to union welfare trusts." (238 F. Supp. at 509)

More recently, the U. S. Court of Appeals for the Second Circuit, quoting *Moglia*, held that payment of benefits from union-employer trust funds to employees of non-contributing employers is prohibited by

§ 302(c)(5). *In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973). The same principle is stated in *Blassie* v. *Kroger Co.*, 345 F.2d 58 (C.A. 8, 1965), at 71, where the court holds that the subsection prohibits trusts from paying benefits to persons "who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions." See also *Crawford* v. *Cianciulli*, 357 F. Supp. 357, 369-370 (E.D. Pa. 1973).

Thus, employees of Jackson, a non-union and non-signatory subcontractor, could not lawfully be paid benefits from any of the Carpenters Trust Funds because they are not employees of an employer contributing the funds, as required by § 302(c)(5), and there is no evidence that they have ever been employees of any such employer. Contributions to the trusts by Petitioner on behalf of Jackson's employees would not, therefore, meet the requirements of § 302(c)(5) because they are not for the benefit of employees of "other employers making similar payments" to the Trusts.[6]

[6] Requiring contributions to the CIAF Trust (Case No. 389-038) would not violate § 302 if it is administered solely by employer representatives and does not, therefore, involve employer payments "to any representative" of employees. See *NLRB* v. *Brotherhood of Painters, etc.*, 334 F.2d 729, 731 (C.A. 7, 1964). Although the CIAF trust agreement (Pl. Ex. 4) authorizes selection of trustees solely by an employer association as trustor, there was testimony that all of the trusts in litigation have an equal number of management and labor trustees (A. 62).

If the CIAF Trust is subject to § 302 because of labor representatives serving as trustees, it would apparently be invalid as having purposes outside those specified in § 302(b)(5) through (8). *Local No. 2, Plasterers etc. Union* v. *Paramount Plastering, Inc.*, 310 F.2d 179 (C.A. 9, 1962), cert. den. 372 U.S. 944 (1963).

In holding that a trust benefiting persons other than employees of contributing employers violates § 302(c)(5), *Moglia* and the other decisions cited above appear to be in accord with the intent of Congress in enacting § 302. The principal purposes of § 302 were to remove funds intended to benefit employees from absolute control by union officials, and to ensure that the funds were used to benefit employees of the contributing employers. *Arroyo* v. *U. S.*, 359 U.S. 419, 425-426 (1959); *Bricklayers etc.* v. *Stuart Plastering Co.*, 512 F.2d 1017, 1024 (C.A. 5, 1975); II *Legislative History of the Labor Management Relations Act of 1947*, pp. 1304-1323.

Senator Ball, a chief supporter of § 302, stated in debate on the section that its

> "sole purpose . . . is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits *to the employees of the employers who contribute to them*, and that they shall not degenerate into bribes. (II *Legislative History*, *supra* at p. 1305, emphasis supplied.)

The courts have recognized that strict enforcement of the requirements of § 302 was intended by Congress, as essential to carry out its purposes. As the Court of Appeals for the Fifth Circuit stated in *Bricklayers* v. *Stuart Plastering Co.*, *supra*:

"Section 302(c) is a narrow exception to the general prohibition of employer-employee payments contained in Sections 302(a) and 302(b). Strict compliance with the terms of Section 302(c) is required to settle a qualifying Taft-Hartley Trust. As Judge Waterman said in *Moglia* v. *Geoghegan*, 2 Cir. 1968, 403 F.2d 110, 115: '[a] reading of the legislative history of Section 302 shows that Congress intended to prohibit the establishment of any union funds by means of employer payments unless the funds conformed *in all respects* with the specific dictates of Section 302(c).'

Section 302 requires adherence, in the settlement of Taft-Hartley trusts, to a purposefully rigid structure of design to insure that employer contributions are made only for proper purposes and that fund benefits reach only proper parties. Senator Ball, one of the managers of this legislation in the Senate, aptly expressed the legislative purpose when he said that 'unless . . . such funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, there is very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they are established and that they will in fact become rackets.' 93 Cong. Rec. 4678 (1947). Judge Waterman reiterated this congressional concern, and the co-ordinate need for its strict judicial enforcement, when he said in *Moglia* that '[a]ny erosion of the strict requirements of the section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted.' 403 F.2d 110, 116." (512 F.2d at 1024-1025)

Moreover, § 302(c)(5) places on unions the burden to "establish" trust funds meeting the requirements of § 302. *Bricklayers etc.* v. *Stuart Plastering Co., supra*, 512 F.2d at 1020; *Local Union No. 529 etc.* v. *Bracy Development Co.*, 321 F. Supp. 869, 875 (W. D. Ark. 1971).

The Oregon Supreme Court appears to recognize that its decision in this case conflicts with the interpretation of § 302(c)(5) in *Moglia* v. *Geoghegan, supra.* At footnote 4, the Oregon Supreme Court states (540 P.2d at 1015, pp. 35-36, *infra):*

"We have not overlooked the statement by the Court in *Moglia* v. *Goeghegan* [sic], 403 F.2d 110 (C.A. 2, 1968) (at 116) that 'Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust.' It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia*, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case."

The Oregon Supreme Court relies on *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (S.D. N.Y. 1960), decided eight years before the *Moglia* decision

of the Second Circuit Court of Appeals. The District Court in that case held that an agreement requiring an employer to make contributions to trust funds in accordance with a formula based upon hours of his own employees, as well as hours of non-signatory subcontractors' employees, did not violate § 302. The facts and result were almost identical in *Budget Dress Corp.* v. *Joint Board*, 198 F. Supp. 4 (S.D. N.Y. 1961), aff'd 299 F.2d 936 (C.A. 2, 1962), cert. den. 371 U.S. 815 (1962).

The decisions in *Kreindler* and *Budget Dress* are distinguishable. The agreements there included payrolls of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractors' employees. Neither does it appear that the subcontractors' employees were beneficiaries of the funds in those two cases. Unless so distinguished, *Kreindler* and *Budget Dress* appear to be inconsistent in principle with the later decisions of the Court of Appeals for the Second Circuit in *Moglia* and *Typo-Publishers*, *supra*.

The Subcontractors Clause in this case, unlike those in *Kreindler* and *Budget Dress*, requires employers bound by it to "be liable for payment of" contributions to the Carpenters Trusts, "in accordance with this Agreement," for the non-union subcontractors' employees. The Oregon Supreme Court paraphrased this Clause as obligating the signatory gen-

eral contractor to "be liable for payments to various trust funds *for the employees of*" carpentry subcontractors (emphasis supplied). 540 P.2d at 1015; p. 36, *infra*.[7] Thus, the Clause here does not merely measure the signatory employer's contributions on the basis of a subcontractor's payroll. It requires contributions for the benefit of the subcontractor's employees.

The Court of Appeals for the Second Circuit in *Typo-Publishers* also distinguished *Bey* v. *Muldoon*, 223 F. Supp. 489 (E.D. Pa. 1963), aff'd 354 F.2d 1005 (C.A. 3, 1966), cert. den. 384 U.S. 987 (1966), as involving a trust in unusual circumstances where it was difficult to determine whether the trust might illegally benefit any longshoremen who were never employed by the one stevedore employer contributing to the trust. 478 F.2d at 376.

B. The Subcontractors Clause, as construed and applied below, frustrates the purpose of the Davis-Bacon Act, 40 U.S.C. § 276a, to prohibit unfair competition based on some contractors obtaining cheaper labor costs than other contractors.

The decision of the Oregon Supreme Court in this

[7] It is possible to read the Subcontractors Clause as requiring Petitioner, the signatory employer, only to guarantee any contributions to the trusts otherwise due from a non-union subcontractor. *Cf.*, the similar clause in Para. 5 of the Memorandum Agreement (Pl. Ex. 1, A. 75-76). Such a gloss would avoid conflict with § 302, and require a decision in Petitioner's favor, because Jackson was not obligated to contribute to the Trusts. So read, however, the main purpose of the clause—to penalize a signatory employer for subcontracting work to a non-union employer—would be frustrated. Interpretation of a collective bargaining agreement is, of course, a matter of federal law. See, *e.g.*, *Clark* v. *Kraftco Corp.*, 510 F.2d 500, 506 (C.A. 2, 1975).

case also tends to frustrate the principal purposes of the Davis-Bacon Act, 40 U.S.C. § 276a.

The HUD agreements in this case subjected the Oak Hills project to the Davis-Bacon Act requirements that employers pay the "prevailing wages," including fringe benefits, to or for the benefit of all workmen on the job (A 26). That Act permits payment of fringe benefits either to union-employer trusts for the benefit of the workmen, or directly to the workmen. Since Petitioner's subcontractor, Jackson, was not a signatory to any agreement providing for him to contribute to the Carpenters Trusts, he could lawfully pay the fringe benefits only directly to his carpenter employees, in addition to their regular wages, and it is stipulated that he did so (A. 50).

The decision of the Oregon Supreme Court enforces the Subcontractors Clause by requiring Petitioner, as the general contractor, to pay the amount of the fringe benefits for Jackson's employees a second time through contributions to the Carpenters Trusts of the same amounts (96c per hour) that Jackson paid directly as fringe benefits to his carpenter employees. This means that a Davis-Bacon Act job will cost a contractor more to perform if he uses a non-union subcontractor than if he uses a union subcontractor who would, presumably, be bound by the Master Agreement and obligated to pay the fringe benefits to the trusts, rather than directly to his workmen.

In *International Union of Operating Engineers Local 627* v. *Arthurs*, 355 F. Supp. 7 (W.D. Okla. 1973), aff'd 480 F.2d 603 (C.A. 10, 1973), the Court states that the purpose of the Davis-Bacon Act

> "is to provide protection to local craftsmen who were losing work to contractors who recruited labor from distant cheap-labor areas." (355 F. Supp. at 8)

Instead of carrying out the purpose of the Davis-Bacon Act to eliminate unfair competition based on different labor costs of contractors (often due to non-union employers paying less compensation to workmen than union employers), the decision below interprets § 302 in a fashion which allows a collective bargaining agreement to make it more expensive for a general contractor on a Davis-Bacon Act job to use a non-union subcontractor than a union subcontractor. The extra expense to the general contractor imposed by the Subcontractors Clause for using a non-union subcontractor is the amount of the doubling or second payment of the fringe benefits which a non-union subcontractor will have paid directly to his employees, if the subcontractor is not a signatory to any agreement providing for them to be paid into union trusts.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed, with directions to enter a judgment dismissing Respondents' claims against Petitioner.

Respectfully submitted,

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APPENDIX A

§ 302 of the Labor Management Relations Act of 1947, As Amended (29 U.S.C. § 186)

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employer in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with

respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insur-

ance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or

their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX B

Opinion of the Supreme Court of Oregon
75 Or. Adv. Sh. 3326, 540 P.2d 1011
(October 2, 1975)

No. 233—October 2, 1975

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund) (No. 389-034), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Pension Trust Fund) (No. 389-035), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Vacation Savings Trust Fund) (No. 389-036), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund) (No. 389-037), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Construction Industry Advancement Fund of Oregon and Southwest Washington) (No. 389-038), *Appellants, v.* WALSH, *Respondent.*

Appeal from Circuit Court, Multnomah County.

CHARLES S. CROOKHAM, Judge.

Argued and submitted September 8, 1975.

Paul T. Bailey, Portland, argued the cause for appellants. With him on the briefs were Bailey, Doblie & Bruun, Portland.

Carl R. Neil, of Lindsay, Nahstoll, Hart, Duncan, DaFoe & Krause, Portland, argued the cause and filed the briefs for respondent.

AFFIRMED AS TO NOS. 389-037 AND 389-038; REVERSED AS TO NOS. 389-034, 389-035 AND 389-036.

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* McAllister and Denecke, Justices, did not participate in this decision.

TONGUE, J.

These five consolidated cases are suits in equity by the trustees of funds established under a labor-management contract against a general building contractor who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be "bound to all of the provisions of this Agreement" or else maintain records for the subcontractor's employees "and be liable for payment" of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and "construction industry advancement."

The nonunion subcontractor paid an amount equal to these "fringe benefits" directly to his employees in addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that "it is inequitable" to require defendant to make payments which "amount to double fringe benefits" to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that "it is equitable" to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as "funds which do not accrue benefits directly to the workmen."

Plaintiffs appeal from the decree in the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeals from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases.

In support of its appeal plaintiffs contend that upon finding that defendant was obligated by the terms

of his contract with the union to make "fringe benefit payments" to the plaintiffs for the employees of its nonunion subcontractor, the trial court erred in holding that as a court of equity it could, in effect, modify the terms of the contract by holding that defendant was required to make payments into only two of the five trust funds upon the ground that it would be "inequitable" to require payments to the remaining three trust funds.

The trial court recognized that "were I in law, having made the findings of fact, I would have no option but to grant judgment in all five cases for the trustees."

In *Wikstrom v. Davis et ux*, 211 Or 254, 315 P2d 597 (1957), we held (at 268) that:

> "Neither courts of law nor of equity have the right or power to make contracts for the parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must be the guide in construing contracts by the parties thereto. • • •"

To the same effect, see *City of Reedsport v. Hubbard et ux*, 202 Or 370, 385, 274 P2d 248 (1954), holding, in a suit in equity, that:

> "• • • The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. • • •."

In these five consolidated cases the trial court properly concluded that:

> "The labor contract required defendant to make fringe benefit payments to plaintiffs."

Nothing in the terms of the contract justified the court's requirement that payments be made by Walsh

to some of the trust funds, but not to all of them.[1] All the funds have equal standing under the terms of the contract. Payments due to each fund are calculated on the same hours worked per employee. The contract specifies identical legal remedies for failure to pay into any one fund or all of them.

Defendant contends that "the record in this case discloses at least innocent misleading of defendant and unclean hands," as well as laches, in that "the union officials failed to tell defendant until months after completion of the job that payment by Jackson [nonunion subcontractor] of fringe benefits directly to his men • • • would nevertheless leave defendant exposed for payment of the same sums into the trusts for the benefit of Jackson's carpenter-employees."

However, the testimony by defendant to support these contentions was contradicted by testimony offered by the union. The trial court rejected these contentions by its findings of fact and conclusions of law. After examination of the record, we agree with those holdings.[2]

Having so held, the trial court had no authority for "equitable reasons" to deny relief to the union in three of the five cases, while granting such relief in the remaining two cases. It follows that we must reverse the decree of the trial court in those three cases (cases No. 389-034, 389-035 and 389-036) unless we

---

[1] The contract provided as follows:

> "If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such subcontractor to be bound to *all the provisions of this Agreement*, or such contractor shall *maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this agreement.*" (Emphasis added)

[2] This testimony and these findings are discussed further below in connection with defendant's cross-appeal.

conclude that defendant is entitled to prevail in his cross-appeal, as next discussed.

Defendant's first contention on cross-appeal is that the "Subcontractors Clause" of the Carpenters Master Labor Agreement violates 29 USC § 186, to the extent that it may be applied to require defendant to make contributions to union trust funds for the benefit of employees other than his own, as pleaded in defendant's Fifth Affirmative Defense in each of the five cases. The trial court sustained plaintiffs' demurrers to those affirmative defenses.

It is provided in 29 USC § 186 (a) that:

> "It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce . . ."

An exemption is provided in § 186(c)(5) for certain payment by an employer to trust funds, as follows:

> "(c) The provisions of this section shall not be applicable • • • (5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)*: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; • • •." (Emphasis added)

Defendant says that:

> "The net effect of 29 U.S.C. Section 186, with respect to contributions to trusts, is to prevent an employer from paying contributions to a trust for the benefit of anyone other than his employees or his employees as part of a pool with employees of other covered employers. The leading case on this point is *Moglia v. Goeghegan*, 403 F.2d 110 (CA 2, 1968), *cert. den.* 349 U.S. 919 (1969). • • •"

Defendant also cites other cases as following what he contends to be the rule as stated in *Moglia*.[3]

Defendant also says that:

> "The key point of *Moglia* and its progeny is that 29 U.S.C. Section 186 requires that the employer's payments must be for the benefit of his own employees. It is clear that the payments demanded by plaintiffs and awarded by the Circuit Court in two of these cases fail to meet the test of *Moglia*, because defendant Tom Walsh & Co. is being required under the Subcontractors Clause to make payments into the trusts for the benefit of persons who are employees of Jackson, and not his own employees."

As we read *Moglia*, however, the primary holding of that decision was that payments by an employer into such a trust fund must be made pursuant to a *written agreement*. (See 403 F2d at 115-16.) The same is true of most of the *Moglia* "progeny." This is in accord with the purpose of 29 USC § 186 to discourage corruption by prohibiting payments by employers to unions, except for those permitted in accordance with restrictions provided by that statute.[4]

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[3] The cases cited by defendant include: *In re Typo-Publishers Outside Tape Fund*, 344 F Supp 194 (SDNY 1972), *aff'd* 478 F2d 374 (CA 2, 1973), *cert denied* 414 US 1002 (1973); *Insley v. Joyce*, 330 F Supp 1228 (ND 111, ED 1971); *Pidgeon v. Brunswick Port Authority*, 324 F Supp 140 (SD Ga 1971); *Local U. No. 529, U. Bro. of Carpenters, etc. v. Bracy Dev. Co.*, 321 F Supp 869 (WD Ark 1971); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970). See also *Caporale v. Di-Com Corp.*, 345 F Supp 153 (ND 111, ED 1972).

[4] We have not overlooked the statement by the court in *Moglia v. Goeghegan*, 403 F2d 110 (CA 2, 1968) (at 116), that "Only employees and former employees of employers who are

In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement he would be liable for payments into the various trust funds for the employees of such a subcontractor. None of the cases cited by defendant involves such a written contract provision.

In addition, as pointed out in *Kreindler v. Clarise Sportswear Co.*, 184 F Supp 182, 184 (SDNY 1960), also involving payments to a trust fund for employees of a nonunion contractor, in rejecting the defendant's contention that to qualify under 29 USC § 186 such payments must be for the sole and exclusive benefit of the employees of the employer making such payments, the court held:

> "• • • There is no basis • • • for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by the statute 'for the sole and exclusive benefit of the employees of such employer • • • (*or of such employees • • • jointly with the employees of other employees* [*sic*] *making similar payments* • • •)' (Emphasis added)
>
> "The construction of the statute contended for by counsel for Clarise would have most serious and unfortunate consequences. An employer whose employees were engaged in two crafts and who were members of two different unions could not lawfully contribute to the welfare fund of either

lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust." It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia*, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

> because neither would be for the benefit of all of his employees.
>
> "The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal."

We agree with that statement.

See also *Bey v. Muldoon*, 223 F Supp 489, 495 (ED Pa 1963), *aff'd*, 354 F2d 1005 (3d Cir 1966), *cert denied*, 384 US 987 (1966); *Budget Dress Corp. v. Joint Board*, 198 F Supp 4 (SDNY 1961), *aff'd*, 299 F2d 936 (2d Cir 1962), *cert denied*, 371 US 815 (1962); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970).

The fact that these cases were decided prior to *Moglia* does not, in our opinion, mean that they are "not of value," as contended by defendant, not only because the decision is not binding upon this court, but because *Moglia* did not involve a subcontractor and there was no written agreement in *Moglia*, as in this case.

For these reasons, we hold that the trial court did not err in sustaining plaintiffs' demurrer to defendant's Fifth Affirmative Defense.

Defendant's second contention on cross-appeal is:

> "Union officials failed to give defendant any 30-day delinquency notice as required by the Subcontractors Clause as a condition to defendant's liability for contributions for the benefit of a nonunion subcontractor's employees. The Circuit Court erred in failing to sustain this defense."

In support of that contention defendant points out that Article IV of the labor agreement provides that the union will notify the employer "within thirty (30) calendar days of any delinquent payment" to the trust funds.

Defendant says that if any such payments were owed to the trust funds for Jackson's employees "they were due on the 25th of July, 1971 through the 25th

day of December, 1971" and that "the evidence set forth in the records shows that no notice was given of any delinquency in payments * * * until November 16, 1972 * * *."

To the contrary, however, the trial court found that:

"6. Defendant was notified by union officials and by their attorney of defendant's responsibility to pay fringe benefit contributions to plaintiffs as required by the union contract.

"7. Defendant was informed by union officials and by their attorney that if Lloyd Jackson did not make the required fringe benefit contributions to plaintiffs that defendant was required under the union contract to make said payments."

We have examined the record and find that it supports these findings, with which we agree. The contract does not require that written notice be given.[6] Several witnesses testified that before the project in question was started it was made clear to defendant that he was responsible for payments into the trust funds for the employees of the nonunion subcontractor. In addition, and perhaps of more importance, at least one of the union representatives testified that at subsequent conferences with defendant on or about August 2 and August 12, 1971, within 30 days of the completion of the project, the defendant was again told that as the general contractor he was responsible or "obligated" for payment of "these items," and that he was "requested to take care of his obligation."

While much of this testimony was denied by defendant and while it may not be as clear as might be desired, after reading the entire record and after according to the trial judge the benefit of his better opportunity to observe the demeanor of the various witnesses as they testified, as is usual in cases in which there is a conflict in the testimony, we agree with the findings of fact by the trial court. It follows that this assignment of error on defendant's cross-appeal must also be denied.

[6] The contract provides as follows:

"The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)"

Defendant's final contention on cross-appeal is that the trial court erred in denying payment to defendant for the attorney fees incurred by him in the three cases in which the trial court denied relief to the union. Because, however, we have reversed the decrees of the trial court in those cases it follows that we need not consider this contention.

For all of these reasons, we reverse the decrees of the trial court in cases Nos. 389-034, 389-035 and 389-036, and affirm its decrees in cases Nos. 389-037 and 389-038.

IN THE SUPREME COURT

of the United States

October Term, 1976
No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees
of Five Oregon-Washington Carpenters-
Employers Trust Funds,

Respondents.

On Writ of Certiorari
to The
Supreme Court of Oregon

BRIEF OF RESPONDENTS

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OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011. 1/

1/ A single judgment and opinion was rendered by the Supreme Court of Oregon in the five cases, which had been consolidated for trial and all subsequent proceedings. The Respondents are all of the trustees (plaintiffs below) in each of the five cases. Petitioner was the sole defendant below in each of the cases.

JURISDICTION

The Supreme Court of Oregon in this case rejected a defense claimed by petitioner under §302 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §186). This Court has jurisdiction under 28 U.S.C. §1257(3) to review the judgment of the Supreme Court of Oregon by writ of certiorari.

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. The petition for certiorari was filed December 24, 1975, and granted by this Court on March 1, 1976.

QUESTION PRESENTED

Petitioner, a contractor signatory to a collective bargaining agreement which obligates him to make payments to five separate trust funds, the amount of those payments being based on the hours worked by the employees of his non-signatory

subcontractor, alleges that these payments violate §302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186. The legal issues thus raised are the following:

a) Does §302(c)(5), which authorizes payments to Health & Welfare and Pension Trusts, established for the "exclusive benefit of the employees of such [a contributing] employer" forbid payments to such trusts where the applicable trust agreements provide that only employees of contributing employers are eligible for benefits thereunder?

b) Does §302(c)(6) which authorizes payments to, inter alia, vacation and apprenticeship and training program trusts, if these are established in accordance with §302(c)(5)(B), incorporate also the "exclusive benefit" requirement of §302(c)(5)?

c) Has petitioner established that one half of the trustees of the Construction Industry Advancement Fund are appointed by the union (so that payments thereto are subject to §302), notwithstanding the express terms of the Agreement establishing that Fund that all trustees thereof will be appointed by an employer association?

STATUTORY PROVISIONS INVOLVED

This case involves §302 of the Labor-Management Relations Act of 1947, as amended ("LMRA" or "the Act"), 61 Stat. 157, 73 Stat. 537, 83 Stat. 1133, 87 Stat. 314, 29 U.S.C. §186. It is reproduced at Pet. Br. 23-28. In this Court, petitioner also presents an argument under the Davis-Bacon Act, 40 U.S.C. §276a, which is reproduced as an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

We accept the statement of the case by the Supreme Court of Oregon (Pet. Br. 31): 2/

> "These five consolidated cases are suits in equity by the trustees of funds [respondents Schlecht, et al.], established under a labor-management contract against a general building contractor [petitioner Walsh] who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be 'bound to all of the provisions of this Agreement' or else maintain records for the subcontractor's employees 'and be liable for payment' of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and 'construction industry advancement.'
>
> "The nonunion subcontractor [Jackson] paid an amount equal to these 'fringe benefits' directly to his employees in

2/ "Pet. Br." refers to petitioner's brief herein. "A." will refer to the appendix in this Court.

addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

"The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that 'it is inequitable' to require defendant to make payments which 'amount to double fringe benefits' to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that 'it is equitable' to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as 'funds which do not accrue benefits directly to the workmen.'

"Plaintiffs appeal[ed] from the decree of the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeal[ed] from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases."

The Supreme Court of Oregon unanimously

reversed on the plaintiff Trustees' appeal and affirmed on the defendant Contractor's appeal. The court rejected Walsh's equitable defenses. It also rejected Walsh's contention that the payments were forbidden by §302 of the LMRA. Pet. Br. 34-37. The court did not discuss, because Walsh did not assert, any defense under the Davis-Bacon Act, 40 U.S.C. §276a.

SUMMARY OF ARGUMENT

I.

A. Petitioner challenges the legality of payments to the Health and Welfare and Pension Trusts on the ground that they fail to satisfy the requirement in the opening phrase of §302(c)(5) that payments to such a fund must be "for the sole and exclusive benefit of the employees of such [a contributing] employer * * *". His contention is that petitioner's payments, being based on

the hours worked by the non-signatory subcontractor's employees, are "for the benefit" of those employees. Petitioner's factual premise is unwarranted in the record and erroneous. The Trust Agreements expressly provide that they are "for the benefit of the employees of the individual employers"; the term "employee" is defined as "[a]ny employee whether Union or Non-union of an Individual Employer * * *". Thus, under the express terms of the Trust Agreements an employee does not receive benefits by working for a non-signatory subcontractor, or by having contributions made by petitioner because of the work he performs for the subcontractor. Under the Trust Agreements, they can achieve eligibility if, and only if, they perform (before or after working for the non-signatory) work for a signatory contributing employer; in that event, both the

Agreement and the statute are complied with.

The foregoing circumstances distinguish this case from Moglia v. Geoghegan, 403 F.2d 110 (C.A. 2) and others cited by petitioner. In each of those cases, it was held to be illegal to pay benefits to an individual who had never been an employee of a signatory contributing employer. The situation here is, as the court below recognized, identical to that in a series of cases arising in the ladies' garment industry, which have upheld the legality of payments to health, welfare and pension funds made by contributing employers on the basis of the wages of their non-signatory subcontractors.

It adds nothing to petitioner's case to say that the payments were "on

behalf of" the subcontractor's employees. This phrase, to the extent that it reflects reality, means only that under the collective bargaining agreement the work of the subcontractor's employees is the measure of the signatory contractor's obligation to make payments to the funds. Section 302 does not regulate the basis on which such payments are made. It is no disservice to the purpose (declared by this Court in Arroyo v. United States, 359 U.S. 419, 425) to allow employers to make contributions to a pension or health and welfare fund based upon hours worked by persons who may never benefit from such contributions. Indeed, since Congress consciously determined to permit such funds, it is well to remember that this result is inherent in the very nature of such funds because their benefit structures

are invariably based on the assumption that only a certain portion of the employees with respect to whose hours contributions are made will ever derive a benefit therefrom.

Petitioner's characterization of his obligation as a "penalty" is irrelevant for purposes of §302. Moreover, it is inaccurate. A clause which requires contributions to be made to a fund with respect to work which a signatory employer has contracted out to a non-signatory serves a significant function in maintaining the financial integrity of the fund, and safeguarding its ability to pay benefits to covered employees or accomplish its other purposes.

B. Contrary to petitioner's contention, §302(c)(6) which governs payments to the Vacation and Apprenticeship and Training Trusts does not embody the

"exclusive benefit" language of §302(c)(5). Congress stated in §302(c)(6) precisely how much of §302(c)(5) it wished to incorporate, namely §302(c)(5)(B); it is not for the courts to add an additional requirement which Congress omitted. Moreover, since apprenticeship and training funds are plainly not for the exclusive benefit of employees, petitioner's interpretation would nullify the privilege to establish such funds granted in §302(c)(6).

C. The payments to the Construction Industry Advancement Fund are not governed by §302 at all, because, as the Trust Agreement provides, all the trustees of that fund are appointed by an employer association. Petitioner's contrary suggestion is based on a misreading of the testimony he cites.

II.

Petitioner asserts that the payments

would frustrate the purpose of the Davis-Bacon Act, 40 U.S.C. §276a. That contention is not properly before this Court because it was neither presented nor decided in the Oregon courts, nor raised in the petition for certiorari.

In any event, petitioner's position is without merit. The Davis-Bacon Act was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (United States v. Binghamton Const. Co., 347 U.S. 171, 176-177.)

The Davis-Bacon argument has no great substance as a make-weight addition to petitioner's proffered interpretation of §302 of Taft-Hartley. Section 302, a criminal statute, was adopted to achieve certain narrow, specific purposes. Thus, as this Court recognized in Arroyo v. United States, 359 U.S. 419, it cannot

do service to promote other objectives, which Congress sought to accomplish by other laws, or not at all.

ARGUMENT

I. ALL OF THE CHALLENGED PAYMENTS ARE LAWFUL UNDER §302 OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

Introduction

Petitioner entered into a collective bargaining agreement whereby he agreed to make payments to each of five trust funds, the amount of such payments to be determined on the basis of the number of hours worked both by his own employees and by the employees of his subcontractors. He now seeks to avoid that obligation, contending that all such payments are forbidden by §302 of the Labor-Management Relations Act of 1947, as amended.

Section 302 declares it to be a

crime for any "employer" to make payments to "any representative of any of his employees * * *" (§302(a)(1)) and for "any person" to receive a payment forbidden by §302(a). But §302(c) contains several exceptions to this prohibition, set forth in subsections (1) through (8), allowing payments for certain specified purposes. Petitioner's statement of the Question Presented (Pet. Br. 3-4) and his Argument (id. 10-19) treat the payments at issue here wholesale, as if the legality of all were governed by the same statutory standard that is set forth in §302(c)(5). This is incorrect. Only payments to the Health and Welfare Trust and Pension Trust are governed by §302(c)(5). (See pp. 16 - 49 infra.) Payments to the Vacation Savings Trust and the Apprenticeship and Training Trust are governed by §302 (c)(6). (See pp. 50 - 54 infra.) And

payments to the Construction Industry Advancement Fund are not governed by §302 at all: Because that Trust is administered exclusively by employers, it is not a "representative"; accordingly, payments to it are not within the prohibition of §302(a) and (b) to which the various subsections of (c) are exceptions. (See pp. 55 - 57 infra.)

Clarity of analysis requires that payments which are controlled by different provisions of law be discussed separately. When each of the trusts is thus examined in light of the law applicable to that trust, it will readily be seen that none of the payments that petitioner would avoid is prohibited by §302.

A. The Payments to The Health and Welfare and Pension Trusts are Lawful.

The legality of the payments to the Health and Welfare Trust and to the Pension Trust depends on whether they satisfy the requirements of §302(c)(5).

Petitioner challenges the legality of his making payments to the Health and Welfare and Pension Trusts solely for alleged non-compliance with the requirement that the Trusts must be:

> "established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents."

Petitioner contends that this requirement is not met. We now show that petitioner is in error.

1. The beneficiaries of the trusts are identified in the respective Trust Agreements. Art. II, §2 of the Health and Welfare Plan Fund Trust Agreement (P. Ex. 4, pink paper, p. 5) states:

"This Trust Fund is created for the purpose of providing and maintaining through policies issued by duly licensed insurance carriers or hospital-medical service organizations, group life and group accident and health insurance including group hospitalization, medical and surgical benefits, or any of such insurance as may be determined by the Trustees for the benefit of the employees of the individual employers and associate employees, and if so determined by the Trustees, in whole or in part, group insurance for hospitalization, surgical and medical care for the families of such employees as defined by the Trustees."
(Emphasis added.)

The term "employee" is defined in Art. I, §3a of that Agreement (id. p. 3) as follows:

> "Any employee whether Union or Non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union." 3/
> (Emphasis added.)

3/ The term "associate employee" is defined in Article I, Sec. 3b, to cover also non-bargaining unit employees of contributing

So too, Art. II, §2 of the Pension Trust Fund Agreement (P. Ex. 4, blue paper, p. 5) provides:

> "This Trust Fund is created for the purpose of assisting Employees and their beneficiaries in providing a life income for their support when they shall have retired from the industry, as may be determined by the Board of Trustees pursuant to the provisions of the Pension Plan. The Board of Trustees shall establish in the Plan such eligibility requirements and benefit schedules as it may from time to time deem appropriate."

And "employee" is defined in Art. I, §3 of that Agreement as follows:

> "Any employee whether union or non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union or any supervisor who formerly performed work of the type covered by the

(3/) employers and employees of the Union for whom the Union makes contributions. The former inclusion is within the language of Sec. 302; the latter was approved as complying with Sec. 302(c)(5) in Blassie v. Kroger Co., 345 F.2d 58, 72-74 (C.A. 8, Blackmun, J.).

> Collective Bargaining Agreement and who supervises such employees." (Emphasis added.)

Thus, under both plans, a person becomes a beneficiary only if he is an employee of a contributing employer, just as the statute commands; the plans are structurally in compliance with the Act. It is therefore lawful for an employer who, like petitioner, is a signatory to a written agreement with the Unions requiring payment to the trusts, to make such payments, unless the express terms of the trusts are breached in practice.

Petitioner presents no evidence that any of the non-signatory subcontractor Jackson's employees have actually received benefits in violation of the statute (which would, as we have seen, also violate the Agreement), or that any non-eligible individual has received benefits.

Nor does he show that Jackson's employees became eligible for benefits by virtue of petitioner's contributions. Their eligibility is determined by the Trust Agreements, which restrict benefits to employees of signatory employers, and not as petitioner would have it appear: To employees "on whose behalf" contributions are made, which means only (as we shall discuss) that the hours they work are the measure of petitioner's payment.

As petitioner correctly states (Pet. Br. 12), Jackson, the subcontractor, made no payments to these trusts, which will not receive contributions from him, because he is not a signatory to an agreement requiring contributions. 4/

4/ We note that by refusing to take contributions from a non-signatory, the trusts are in compliance with the requirement of Sec. 302(c)(5)(B) enforced in the two cases on which petitioner especially relies - Moglia v. Geoghegan, 403 F.2d

But for precisely the same reason, those employees' work for Jackson does not qualify them for benefits, for, under the terms of the Agreements, these are limited to employees of contributing employers.

It follows further that if these employees' entire working career were for Jackson, and Jackson never became a signatory, the Agreements themselves would prevent them from ever receiving benefits. And if it were the nature of this industry that an employee has a single employer throughout his career in the industry, we could state without qualification that none of Jackson's employees would ever become eligible for payments. However, for the sake of accuracy and completeness, we note briefly

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(4/) 110 (C.A. 2); and Bricklayers, etc. v. Stuart Plastering Co., 512 F.2d 1017 (C.A. 5).

that such an individual could be eligible if he was also employed by a signatory employer. It is well-known that employment in the building and construction industry is transitory and peripatetic: "An individual employee typically works for many employers and none of them continuously." 5/ Thus, a carpenter who worked for Jackson on the Oak Hill project, out of which this case arose (Pet. Br. 4), may have worked for an employer who was signatory to the Trust Agreements prior to working for Jackson, or may have worked for a signatory after the Oak Hill project was completed. As any individual who performed work for a signatory contractor during the time he made contributions under the Agreements would be eligible for benefits,

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5/ S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 27.

6/ one of Jackson's employees on the Oak Hill project would be eligible for benefits if (and only if) he qualified by working for a contributing signatory. In that event, it would be entirely lawful under §302(c)(5) to provide him with benefits because he would then be an "employee" of a contributing employer. The law does not require that an "employee" be disqualified because he had also worked for a non-signatory contractor. That is the precise holding of Roark v. Boyle, 439 F.2d 497 (C.A.D.C.) and Crawford v. Cianciulli, 357 F.Supp. 357, 369-370 (E.D. Pa.), cited at Pet. Br. 14.

2. The fact that under the Trust Agreements Jackson's employees do not

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6/ We refer here only to eligibility in terms of the Agreements' definition of "employee"; of course, the qualifications for receipt of benefits which are set by the Trustees must also be met.

become eligible unless they at some time perform work for a contributing signatory employer distinguishes the present case from each of the cases on which petitioner places his claim of illegality. In Moglia v. Geoghegan, 403 F.2d 110 (C.A. 2) cert. denied, 394 U.S. 919, Moglia had a single employer for 28 years (id. at 114) whose payments to the trust were illegal because he was not a party to a written agreement as also required by §302(c)(5)(B).

> "Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund. Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust.

> Rittenberry v. Lewis, 238 F.Supp 506 (E.D. Tenn. 1965); Bolgar v. Lewis, 238 F.Supp. 595 (W.D. Pa. 1960)."
> Id. at 116, emphasis added to show the language particularly relied on by petitioner (Pet. Br. 13).

Moglia was never an employee of an employer who was lawfully contributing; it was therefore unlawful for him to be a beneficiary.

The Rittenberry and Bolgar cases followed by the Moglia court, and also relied on by petitioner, were suits by miners for benefits under the United Mine Workers of America Welfare and Retirement Fund which was established by National Bituminous Coal Wage Agreements. In both cases, the plaintiff was held to be disqualified under §302 because he had not been employed by a signatory, contributing employer. In Rittenberry, the court said:

> "In view of the fact that it is undisputed that the plaintiff

> was never employed by an employer who was a signatory to the National Bituminous Coal Wage Agreement, it is the opinion of the Court that he could not, as a matter of law, qualify as a beneficiary under the trust."
> 238 F.Supp. 506, 508.
> (Emphasis added.)

So too, in In re Typo-Publishers Outside Tape Fund, 344 F.Supp. 194, affirmed 478 F.2d 374 (C.A. 2), cert. denied 414 U.S. 1002 (Pet. Br. 14), the arbitration award was held to be unlawful because, as then Judge Tyler put it in the District Court:

> "Inasmuch as the award in this case seeks, in a similar situation, to use the trust funds to benefit employees who are not and never have been employees of contributing employers, implementation of the award would violate §302(a)."
> 344 F.Supp. at 196-197.

Thus, each of the cases in which a payment was held to be unlawful the employee who sought the benefits had never performed work for a signatory contributing employer. Any of Jackson's employees

who had never performed work for a signatory contributing employer to the Trusts herein would likewise be ineligible. Conversely, those of Jackson's employees who worked for a signatory contractor would be eligible notwithstanding that they had also worked for Jackson, just as in Crawford v. Cianciulli, 357 F.Supp. 357 (E.D. Pa.) (Pet. Br. 14). 7/

In sum, the making of the payments, which petitioner challenges is in full compliance with the law as stated by Mr. Justice Blackmun for the Eighth Circuit in Blassie v. Kroger Co., 345 F.2d 58, 71, quoted in part at Pet. Br. 14:

> "* * * the statute does not, and the trust agreement therefore cannot, permit the extension of benefits to persons who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions."

7/ Petitioner quotes at length from Bricklayers v. Stuart Plastering Co., 512 F.2d 1017, 1024-1025 (C.A. 5) (Pet. Br. 16-17). We agree with everything that is there said, but it does not advance petitioner's case one iota. There the trust agreement had never been executed, and thus no trust was established.

The Trust Agreements herein do not allow benefits to be received by individuals in either of the forbidden categories; and there is no evidence that any such individuals in fact received or were intended to receive such illegal benefits. Accordingly, the payments here are entirely lawful.

3. The lower court cases which do decide the legality of payments identical to those in this case are those relied on by the Supreme Court of Oregon (Pet. Br. 36-37): Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182 (S.D.N.Y.) and Budget Dress Corp. v. Joint Board, 198 F.Supp. 4 (S.D.N.Y.), aff'd. 299 F.2d 936 (C.A. 2), cert. denied 371 U.S. 815. As petitioner correctly describes those cases,

which arose in the ladies' garment industry, they involved "an agreement requiring an employer to make contributions to trust funds in accordance with a formula based upon hours of his own employees, as well as hours of non-signatory subcontractors' employees" (Pet. Br. 18). 8/

8/ The Agreements in question were fully described by Judge Weinfeld in Greenstein v. National Skirt & Sportswear Ass'n., Inc., 178 F.Supp. 681, 684-685 (S.D.N.Y.):

"The agreement provides for employer contributions to three separate funds, Health and Welfare, Retirement, and Severance. The payments are based upon a percentage of weekly wages of the workers employed by a manufacturer in his inside shop, if he maintains one, and in addition, a percentage of the gross amount paid by him to each of his contractors and sub-manufacturers for labor, overhead and services. The agreement contemplates that work on garments, whether by employees of Association members or outside contractors, will be performed in union shops. However, it appears that plaintiffs, contrary to the agreement, placed work with non-union contractors and that the welfare fund payments made by them included sums computed on amounts paid

The court held that these agreements did not violate §302. As Judge Dimock wrote in Kreindler:

(8/) to non-union contractors for labor, overhead and services.

* * *

"Perhaps in anticipation that some Association members might honor the agreement more in the breach than in observance, the parties agreed that if any payments to the welfare funds are computed upon garments manufactured for an Association member by non-union contractors in violation of the agreement, such portion

'shall be deemed paid to Local #23 solely as liquidated damages for such violation and shall not be deemed payments made for and on behalf of the Health and Welfare Fund * * * All damages paid hereunder to Local #23 shall be turned over by it to a Fund to be established by the International and to be administered by a Board of Trustees, composed of representatives of the International and employers in the women's garment industry and presided over by an impartial umpire, the Fund to have such beneficent purposes as the Board of Trustees shall determine and which shall be in the interests of the workers

"Clarise contends that payment to these Funds of amounts based on the payrolls of employees who cannot share in the benefits from the Funds is illegal.

* * *

"... There is no basis ... for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by statute 'for the sole and exclusive benefit of the employees of such employer ... (or of such employees ... jointly with the employees of other employees [sic] making similar payments ...)'

* * *

"The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal." 184 F.Supp. at 183-184,

(8/) covered by this and similar collective agreements entered into by the International or its affiliates with employer associations.'"

(emphasis in original).

In Budget Dress, Chief Judge Ryan wrote:

"We conclude, as have our colleagues before us, that the statute is in no way concerned with the technical aspects of determining and administering benefits under legitimate plans as defined and made up in accordance with statutory directive (302 (c) (5) (B)), whose sole purpose is to provide benefits for employees of the dress industry covered by the collective bargaining agreements; and that the rules and regulations in question prescribing eligibility under the plans are consonant with this purpose. So long as the funds are used for the benefit of the employees and not diverted to other uses, the statutory immunity applies to these payments - regardless of whether in a proper case a remedy might lie open to an individual employee against the Trustees of the Fund." 198 F.Supp. at 12 9/

9/ In affirming this decision, the Court of Appeals (Moore, Friendly, and Marshall sitting) relied on Minkoff v. Scranton Frocks, Inc., D.C., 181 F.Supp. 542, aff'd per curiam 279 F.2d 115 (2 Cir. 1960) and the District Court's opinion on the Sec. 302 issue, 299 F.2d 936, 937.

The decisions of his "colleagues" which Chief Judge Ryan found persuasive in Budget Dress were those in Kreindler, 184 F.Supp. 4, and Minkoff v. Scranton Frocks, 181 F.Supp. 542 (S.D.N.Y.), aff'd 279 F.2d 115 (C.A. 2), and Greenstein, from which we quoted in extenso at pp. 30-32, n. 8, supra. In Greenstein, Judge Weinfeld also set forth the parties' respective positions, which are indistinguishable from those of the parties here.

There, as here, the gist of the employer's objection was:

> "that insofar as the payments to the funds were based on amounts paid to non-union contractors they were "not paid for the benefit of the employees of the plaintiff or the employees of its contractors, nor were said funds received by the defendants for the benefit of any employees of the plaintiffs' contractors'; that the defendants received the said sums although the employees on whose behalf such

> payments were made are entitled to no benefit from the funds." 178 F.Supp. at 684, emphasis added.

So too, the Union's position was, as ours is:

> "The Union responds that the Act does not specify how monies paid by an employer into a welfare fund are to be computed; that this is a matter to be decided between the employer and the union representatives; that in the instant case they agreed that the payments were to be measured by a percentage of the inside manufacturer's payroll combined with a percentage of payments made by him to his contractor for labor, overhead and services. It urges that this method of computation was adopted to measure the Association members' liability for payment into the fund; that the method has no relationship to which employees are eligible for fund benefits; that eligibility is determined by other provisions of the collective bargaining agreement and the by-laws and rules and regulations which govern the administration of the welfare funds. The Union emphasizes that under the agreement no employee has any right or claim to any payment made by an employer to the funds; that funds are pooled and the right of an employee to receive

> benefits therein follows from his employment by a covered employer - that is - an employer, whether manufacturer, jobber or contractor, who has entered into contractual relations with the Union. In sum, it urges that the method of computation for determining an Association member's liability to the fund is entirely legal and does not contravene section 302." (Id. 686)

Judge Weinfeld commented "[t]hat its [the unions'] position is one of substance and cannot be gainsaid"(id.). He was not called upon to decide more because the case was before him on a motion for preliminary injunction by a signatory employer who wished to avoid making payments.

Petitioner observes that Kreindler and Budget Dress antedated Moglia and Typo-Publishers. But in neither of the later cases did the Second Circuit disapprove Kreindler or Budget Dress. 10/

10/ Thus, the court below was entirely justified in relying on the reasoning of those decisions

Petitioner says:

> "The decisions in Kreindler and Budget Dress are distinguishable. The agreements there included payrolls of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractors' employees. Neither did it appear that the subcontractors' employees were beneficiaries of the funds in those two cases." (Pet. Br. 18)

But we have already shown that the payments are not "for the benefit of" Jackson's employees. And we now show that they are not "on behalf of" those employees in any sense that is prohibited by the statute; indeed, the same locution was unsuccessfully advanced by the

(10/) (Pet. Br. 37). Petitioner asserts that the court below "appears to recognize that its decision in this case conflicts with the interpretation of Sec. 302(c)(5) in Moglia * * *" (pet. Br. 17). We do not so read the language which petitioner quotes. In any event, as stated in the text, we accept Moglia's interpretation, but the facts which were decisive in that case are not present in this case.

employer in the Greenstein case, see pp. 30-32, n. 8, supra, quoting 178 F.Supp. at 684.

Petitioner does not explain what he means by this phrase, which is central to his argument. 11/ It is, in any event, clear that the most that "on behalf of" can accurately mean is that the amount of the payments by petitioner to the fund is based upon the hours worked by Jackson's employees. Petitioner's obligation under the labor agreement is to "maintain daily records of the sub-contractors employes job site hours, and [to] be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions

11/ The same phrase is used in the Question Presented (Pet. Br. 3-4) and Pet. Br. 14. See also Pet. Br. 12, where it is said that the payments are "for Jackson's non-union employees."

in accordance with this Agreement . . ." (A. 82-83, quoted at Pet. Br. 5-6, our emphasis). Thus, "on behalf of such employees" is but petitioner's rephrasing of "these employees' * * * contributions." This in turn is but a shorthand (though perhaps an inartful one) 12/ for the thought that the contributions are made on the basis of the work performed by the employees. It is equally obvious, and in terms of the statutory issue in this case absolutely decisive, that the phrase "employees' * * * contributions" in the collective bargaining agreement does not mean (and that petitioner's alternative phrasing cannot accurately mean) that the payments are for the benefit of those employees. For

12/ Taken literally, the Agreement would mean that the employees make the contributions, but this is, of course, not the case where the signatory performs the work through his own employees or where he uses a subcontractor.

the same phrase is used with respect to all the funds, and a payment to an apprenticeship training fund or an industry promotion fund cannot by any stretch be for the benefit of the employee who performs the work which results in the obligation to make the contribution.

In sum, contrary to petitioner's assertion, the subcontractors clause here does "merely measure the signatory employer's contributions on the basis of a subcontractor's payroll" (Pet. Br. 19); it does not require "contributions for the benefit of the subcontractor's employees" (id.).

4. As petitioner implicitly concedes there is nothing in §302 which regulates the measure of payment to a fund authorized by subsection (c)(5). The purposes of enacting §302 are well known. They were identified by this Court in Arroyo v. United States, 359 U.S. 419:

> "Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See United States v. Ryan, 350 US 299." (Id. at 425-426, footnotes omitted.) 13/

It is no disservice to these purposes to allow employers to make contributions to a pension or health and welfare fund based upon hours worked by persons who may never

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13/ That union, as noted in United States v. Ryan, was the United Mine Workers, which had demanded "that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined" (350 U.S. at 304-305). Congress did not, in enacting Sec. 302(c)(5), forbid such a royalty as the measure of payment.

benefit from such contributions. Indeed, since Congress consciously determined to permit such funds, it is well to remember that this result is inherent in the very nature of such funds because their benefit structures are invariable based on the assumption that only a certain portion of the employees with respect to whose hours contributions are made will ever derive a benefit therefrom.

For example, when a pension plan requires that a participant have a minimum number of hours of covered employment in order to obtain a year of credited service and, further prescribes a specified number of years of such credited service as a condition of eligibility for retirement benefits, it is assumed that a substantial percentage of employees will leave covered employment without ever meeting those requirements, and accordingly, that no benefit will ever be

paid on their behalf despite the fact that their employment may have generated substantial amounts of contributions. This "turnover" of employees who will never qualify for benefits is regarded as "a cost-reducing factor to the pension fund", which makes it possible for a "given contribution rate [to] support a higher level of projected benefits" to those who do achieve the requisite hours and years of service. It is similarly assumed that a given number of participants will die before becoming eligible for retirement benefits and this is also regarded as a factor which "reduces the cost of a pension plan." 14/

14/ See Melone, Collectively Bargained Multi-Employer Pension Plans, (Homewood, Ill., Richard D. Irwin, Inc., 1963) pp. 78-81. See also Bernstein, The Future of Private Pensions, (New York, N.Y., The Free Press of Glencoe, 1964), pp. 39-46; Allen, Melone & Rosenbloom, Pension Planning (Homewood, Ill., Richard D. Irwin, Inc., 1976), pp. 72-76 .

It is likewise clear that contributions to a health and welfare plan providing medical and related benefits will be made on the basis of hours worked by many employees who will not benefit therefrom. Many such employees will be excluded from benefits because of failure to work the minimum number of hours of covered employment in a given quarter (or other eligibility period). Others, quite obviously, will never need the services which such funds provide, and the contri-

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(14/) In studies leading to enactment of the Employee Retirement Income Security Act of 1974 it was found by Congress that only one out of three employees participating in employer-financed pension plans had a substantially vested right to a retirement benefit. (See H.Rept.No. 93-807, p. 12). Even though the legislation was designed to enhance the likelihood that participating employees would realize some portion of their anticipated retirement benefit, it still permits a plan to deny any benefit to any employee who, e.g., has less than 10 years of covered service -- notwithstanding that contributions may have been made with respect to each hour worked by such an employee. (Employee Retirement Income Security Act of 1974, Sec. 203(a)(2); 1012(a); 88 Stat. 854, 902; 26 U.S.C. 411(a)(2); 29 U.S.C. 1053(a)(2)).

butions made with respect to their hours will accordingly be used for the benefit of those who do.

The inherent absence of direct relationship between the contribution made with respect to an employee's hours and the amount of any benefits paid to such an employee is also reflected in the widespread practice, when multi-employer pension plans are established of granting credit to employees for all past service in the industry. See Melone, op. cit. supra, p. 31, where it is pointed out that "[m]uch of this past service in the industry may have been rendered for non-participating and defunct employers", and, accordingly, that "[t]hese costs must be borne solely by participating employers." While such costs may be met by contributions calculated on the basis of the hours worked by currently employed persons, it is clear that the benefits

attributable to past service credits will have no connection whatever with the hours upon which such contributions are imposed.

In short, it is the very nature of these Pension and Health and Welfare Plans that the actual receipt of benefits by any participant, and the amount of benefits which he may receive, are based upon factors which are in large part unknown at the time that the work is performed and which in any case are wholly unrelated to the particular contribution formula which the underlying collective bargaining agreement may impose.

5. And so, petitioner's case comes down to his objection that these payments are a "penalty" (Pet. Br. 10, 11). The legal answer is that §302 was not adopted to relieve employers of improvident or even onerous -- as opposed to corrupt -- conditions to which they have agreed. Cf.

Porter Co. v. N.L.R.B., 397 U.S. 99, 109. Moreover, the epithet is undeserved. A clause which requires contributions to be made to a fund with respect to work which a signatory employer has contracted out to a non-signatory serves a significant function in maintaining the financial integrity of the fund, and safeguarding its ability to pay benefits to covered employees or accomplish its other purposes.

It is typical in these situations for the parties to start with a contribution rate that is negotiated through the collective bargaining process -- a rate based upon such factors as a percentage of payroll or so much per unit of output. Projections are then made as to the actual level of contributions that such rate will produce, and on the basis of those projections the trustees of the

fund develop a benefit structure which, in the light of appropriate actuarial calculations, the fund's income from contributions can be expected to support. As one authority has concluded in describing this process, "the assumption as to future contribution levels is one of the most important factors affecting the financial soundness of these plans." Melone, Collectively Bargained Multi-Employer Plans, Homewood, Ill., Richard D. Irwin, Inc., 1963, pp. 84-85, 91.

It is evident that if the actual contributions fail to meet projections because work which signatory employers were expected to perform has instead been contracted out to non-signatories, the fund may well find itself unable to meet the expectations created by its structure. A contracting-out clause, such as that found in the instant case, plainly

decreases that risk. It advantages not only the employees but the employers in the industry by attracting and retaining skilled help within the local labor force of the industry. 15/

15/ The importance of accurate forecasting of contribution levels has been given new emphasis by the enactment of the Employee Retirement Income Security Act of 1974 (88 Stat. 829, 29 U.S.C. 1001, et seq). That legislation requires that annual contributions to a pension fund, such as that involved in the instant case, must be sufficient to meet the costs of currently accruing liabilities, and to amortize unfunded past service liabilities over a period of not more than 40 years. In adopting this requirement, Congress recognized that even where the contributions to a collectively bargained multi-employer plan are projected at a level sufficient to meet the statutory standards, there may nonetheless be a shortfall due to an unanticipated drop in the amount of employment or productive activity covered by the fund. (See Sen. Rept. No. 93-1090, p. 285). While such a shortfall would not ordinarily subject the participating employers to the otherwise applicable excise tax penalties for failure to meet the Act's minimum funding requirements, the amounts of deficiency involved would have to be treated as an "experience loss", requiring the parties, at the next round of bargaining, to agree upon increased contributions sufficient to amortize such deficiencies over not more than 20 years (see Sen. Rept. 93-1090, p. 285); Employee Retirement Income Security Act of 1974, §§ 302(b)(2)(B)(iv); 1013(a); 88 Stat. 870, 914;

B. The Payments to the Vacation and Apprenticeship and Training Trusts Are Lawful.

The legality of the payments to the Vacation and Apprenticeship and Training Trusts is governed by §302(c)(6) which authorizes payments:

> "with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds ..."

Petitioner asserts that the requirement of §302(c)(5) that payments must be for the exclusive benefit of employees of the

(15/) 26 U.S.C. 412(6)(2)(B)(iv); 29 U.S.C. 1082 (b)(2)(B)(iv). The risk of such "experience losses", and the consequent need to renegotiate contribution rates in order to amortize them, is obviously diminished if those losses are avoided through a clause which protects the fund against diminished income resulting from the contracting out of work otherwise covered by the agreement.

contributing employer, and their families, etc., is applicable also to §302(c)(6) (Pet. Br. 12, .5). In support of this proposition petitioner cites, without further discussion, "Blassie v. Kroger Co., 345 F.2d 58, 74," and Judge Tyler's opinion in In re Typo-Publishers Outside Tape Fund, p. 27, supra, which cites Blassie. We submit that both petitioner and Judge Tyler have misread Blassie, which does not so hold, and that the construction of §302(c)(6) asserted by petitioner is demonstrably wrong.

The discussion of §302(c)(6) in Blassie reads as follows:

> "We reach a like conclusion as to the language of §302(c)(6). This, adopted in 1959, carefully spells out, as an amendment to such a statute should, a then desired broadening of the stated exceptions. This was to remove doubts therefore existing as to apprenticeship and training programs and as to vacation, holiday, severence or similar benefits. H.Rep.No. 741, 2 U.S.

> Code Cong. & Ad.News, 86th Cong., 1st Sess., 1959, pp. 2424, 2445-2456 and 2469-2470."

This statement, which we fully accept, describes the nature of the programs which were to be permitted under §302(c)(6); it says nothing about importing into that subsection the "exclusive benefit" language of §302(c)(5). 16/ Judge Tyler in Typo-Publishers relied exclusively on what he mistakenly believed to have been decided in Blassie. 17/

16/ The issue of which this part of the opinion was addressed was whether Sec.302(c)(6) permits the expenditure of a substantial amount of trust funds for pure recreation. (id. at 74-75).

17/ "The Sec.302(c)(6) exception does not recite the phrase quoted above or, indeed, any of the limitations found in Sec. 302(c)(5). Section 302(c)(6), however, was intended only to expand the scope of valid trust purposes and the limitations contained in Sec.302 (c)(5) are deemed incorporated into Sec. 302(c)(6). Blassie v. Kroger Co., 345 F.2d 58, 74 (8th Cir., 1965)." (344 F.Supp. at 196, n. 2.)

There are two reasons why the exclusive benefit language of §302(c)(5) cannot properly be read into §302(c)(6). First, Congress stated in §(c)(6) quite explicitly how much of §(c)(5) it wanted to incorporate; namely, §(c)(5)(B). 18/ Congress having gone that far but no further, it is not for the courts to read into §(c)(6) the additional limitation stated in §(c)(5). Second, the petitioner's proffered interpretation would make it impossible to have a lawful apprenticeship or training fund since it is not their purpose to benefit the contributing employer's employees. 19/

18/ This provision requires a written agreement, see Moglia, supra, and prescribes the structure of the Fund, most importantly that there must be equal representation of unions and employers.

19/ Article II, Sec. 2 (p. 4) of the Apprenticeship and Training Fund Agreement provides:

> "That the Trust Fund shall be used for the purpose of defraying costs of apprenticeship or other training programs

In that regard, it differs from the purposes permitted by §(c)(5), (7) and (8) all of which describe the purposes of the permitted funds in terms of kinds of benefits to employees.

In sum, petitioner's objection to making payments to the Vacation and Apprenticeship Funds is based on a misinterpretation of §302(c)(6), and must be rejected.

(19/) by the education of apprentices and journeymen, by the establishment, maintenance and/or support of any apprenticeship training school by the furnishing and supplying of facilities, tools, equipment and text books and other materials and supplies for the training of apprentices and journeymen, and by such other matters reasonably related to journeymen, and by such other matters reasonably related to journeymen [typographical error] and apprentice training as the Board of Trustees deems practicable."

This is in contrast to the statements of purpose in the Health and Welfare and Pension Trust Agreements, which as we have seen are to provide benefits for employees. Significantly, petitioner does not assert that the Apprenticeship and Training Fund is structurally deficient under Sec. 302(c)(6); yet his interpretation of the section would compel that conclusion.

C. The Payments to the Construction Industry Advancement Fund Are Lawful.

With respect to the last of the funds, the Construction Industry Advancement Fund (CIAF) trust, petitioner's brief states:

> "Requiring contributions to the CIAF Trust (Case No. 389-038) would not violate §302 if it is administered solely by employer representatives and does not, therefore, involve employer payments 'to any representative' of employees. See NLRB v. Brotherhood of Painters, etc., 334 F.2d 729, 731 (C.A. 7, 1964). Although the CIAF trust agreement (Pl. Ex. 4) authorizes selection of trustees solely by an employer association as trustor, there was testimony that all of the trusts in litigation have an equal number of management and labor trustees. (A. 62)."
> (Pet. Br. 14, n. 6)

Petitioner then asserts that if §302 is applicable, the payments are illegal as not being within one of the exceptions set forth in §302(c)(5)-(8) (id. at pp. 14-15, n. 6). The latter legal proposition is unassailable, but the suggestion that §302

is applicable is wholly baseless.

Petitioner admits that the trust agreement provides for exclusive employer administration. 20/ But petitioner raises a doubt as to whether the trust agreement is followed by misreading the testimony which he cites ("A. 62"), and which we now quote:

> "Q And the trustees of these funds are an equal number of management trustees as labor trustees.
>
> A. Under the Taft-Hartley, the labor management act.
>
> Q. What was your answer?
>
> A. The answer is yes.

20/ This concession is required. Article III, Sec. 1 (p. 3)of the Trust Agreement establishing the CIAF provides:

> "The Fund shall be administered by a Board of Trustees which shall consist of six Trustees designated by Trustor. The initial Trustees shall be those who are parties to this Trust Agreement."

Article I, Sec. 6 in turn defines the "Trustor" as being the Oregon-Columbia Chapter, The Association General Contractors of America, Inc.

> Q. On any of these funds, Health and Welfare, Pension, Vacation, is a beneficiary required to be a union member?
>
> A. No." (A. 62, emphasis added.)

We see that whereas the question of counsel and the witness' answer were confined to "these funds", which the colloquy shows refers to three specific funds (namely, those which pay benefits to employees), petitioner's brief describes the testimony as being "that all of the trusts in litigation have an equal number of management and labor trustees." In short, the factual issue on which petitioner has erected his §302 defense to avoid payment to the CIAF Trust is a sham.

II. NO DAVIS-BACON ISSUE IS PROPERLY BEFORE THE COURT; IN ANY EVENT, THERE IS NO VIOLATION OF THE DAVIS-BACON ACT.

Point B of petitioner's argument is that the Subcontractors Clause "frustrates

the purpose of the Davis-Bacon Act, 40 U.S.C. §276a" (Pet. Br. 19). We submit that this Davis-Bacon issue is a) not properly before this Court and b) utterly without merit in any event.

A. Petitioner did not present the Davis-Bacon issue to the Oregon Supreme Court; nor did that Court decide it. 21/ This jurisdictional defect pretermits the

21/ The only reference to the Davis-Bacon Act in Walsh's argument in the court below was in connection with his contention that the trial court had properly exercised its equitable discretion in denying plaintiff's relief with respect to three of the trust funds; this equitable defense was rejected by the court below, see Pet. 32-33. As this Court explained in Fuller v. Oregon, 417 U.S. 40, 50:

> "Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. '[T]his Court has stated that when ... the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' Street v. New York, 394 U.S. 576, 582."

consideration of this issue. See, e.g., Fuller v. Oregon, 417 U.S. at 50, n. 11; Monks v. New Jersey, 398 U.S. 71; Herndon v. Georgia, 295 U.S. 441. 22/

There is a further deficiency in petitioner's presentation of the Davis-Bacon issue: It is not part of the Question Presented either as stated in the petition for certiorari (p. 3), or in his brief herein (Pet. Br. 3-4). And while the Davis-Bacon Act was discussed in the body of the petition (at pp. 20-23), the thrust of that discussion appears to have been that certiorari should be granted to review the Oregon Supreme Court's interpretation of §302 because

22/ Cf. This Court's Rule 23(1)(f) requiring the petitioner to specify in the Petition for Certiorari where and how the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the Court. None of these directions was followed with respect to the Davis-Bacon issue.

under that interpretation it is more expensive for a contractor governed by Davis-Bacon to use non-union subcontractors; petitioner did not even state in the "reasons for Granting the Writ" an independent claim under the Davis-Bacon Act. It therefore appears that the Davis-Bacon issue is not a "subsidiary question fairly comprised" within the Taft-Hartley issue stated in the Question Presented even on a most generous interpretation of this Court's Rules 23 (1)(c) and 40(d)(1), and for that additional reason should not be considered, see, e.g., Radzanower v. Touche, Ross & Co., 44 U.S.L.Wk. 4762, n. 3 (June 7, 1976); F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 121, n. 6; J. I. Case v. Borack, 377 U.S. 426, 429; Carpenters Union v. Labor Board, 357 U.S. 93, 96.

B. As stated, we do not believe that petitioner's Davis-Bacon issue is properly presented. Nevertheless, we shall respond briefly to it on the merits because there is at least a colorable claim that the prior references to that Act in the petition and in petitioner's brief below are sufficient to permit consideration of his argument. 23/

23/ The same cannot be said for the issue tendered by the brief of the amicus curiae Mechanical Contractor Associations of Washington. For, the amicus acknowledges that the issue which it would like to have decided is not really here: "If this precise issue was (sic) before the court for consideration, we would frame the issue as follows:" (Amicus Br. 3). Yet amicus does not acknowledge, much less address itself to, the jurisdictional and procedural obstacles it must overcome. And it fails to disclose that that "precise issue" is presently being litigated in a case in which the amicus is the plaintiff, Mechanical Contractor Associations of Washington v. Huico, Inc. (W.D.Wash., #C75-667S). Its brief here is in substantial part a reproduction of its argument in support of its motion for summary judgment in that case. Thus, emulating the cowbird which lays its eggs in the nests of other birds, the amicus, eager to circumvent the normal process of adjudication by the

Petitioner's contention that the Subcontractors Clause "frustrates" the purpose of the Davis-Bacon Act by increasing his labor costs over the minimum required under the Act plainly misconceives the purpose of that statute. This Court has held the Act's language and legislative history "plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (United States v. Binghamton Const. Co., 347 U.S. 171, 176-177.) That purpose is obviously not "frustrated" when contractual arrangements of the parties results in

(23/) District Court, the Court of Appeals and on Petition for Certiorari, would have this Court decide that case as an adjunct of deciding this case. The respondent employer and union trustees do not feel called upon or qualified to represent here the interests of the defendant in another law suit. And they are confident that this Court will view with disfavor amicus' effort to confer upon it a fringe benefit for which the Court did not bargain when it granted certiorari herein.

higher payments than the floor established under the Act.

It is settled, moreover, that "[t]he Act * * * confers no litigable rights on a bidder for a Government construction contract," and that the correctness of the Secretary of Labor's determinations "is not subject to attack on judicial review" (id.). See also Bughman Construction Company v. United States, 164 F.Supp. 239, 240 (Ct.Cl.).

The Davis-Bacon argument has no substance as a make-weight addition to petitioner's proffered interpretation of §302 of Taft-Hartley. Section 302, a criminal statute, was adopted to achieve narrow, specific purposes which we have previously described. Thus, as this Court recognized in Arroyo v. United States, 359 U.S. 419, it cannot do service to promote other objectives, which

Congress sought to accomplish by other laws, or not at all.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted,

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APPENDIX

40 U.S.C. §276a

Rate of Wages for Laborers and mechanics - Definitiones. - (a) The advertised specifications for ever [every] contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and ithout subsequent deduction or rebate on any account, the full amounts accrued at time of payment,

computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in this Act [§§276a-276a-5 of this title] the term "wages," "scale of wages," "wage rates," "minimum wages," and "prevailing wages" shall include -

(1) the basic hourly rate of pay; and

(2) the amount of -

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing

benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as this Act [§§ 276a - 276a-5 of this title] and other Acts incorporating this Act [§§ 276a - 276a-5 of this title] by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under this Act [§§ 276a - 276a-5 of this title], such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the type described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater. (Mar. 3, 1931, c. 411 §1, 46 Stat. 1494; Aug. 30, 1935, c. 825, 49 Stat. 1011; June 15, 1940, c. 373, §1, 54 Stat. 399; July 12, 1960, P.L. 86-624, §26, 74 Stat. 418; July 2, 1964, P.L. 88-349, § 1, 78 Stat. 238.)

In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT et al, as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

A. Respondents' argument concedes, in effect, that the Subcontractors Clause (Art. IV) of the collective bargaining agreement violates § 302(c)(5) if it requires trust contributions for the benefit of a non-contributing subcontractor's employees. Respondents' claim that the clause merely measures contributions of a signatory employer by the hours of work of a non-contributing subcontractor's employees, rather than requiring contributions for the benefit of those employees, is inconsistent with the language of Art. IV

on its face, with its interpretation by the court below and with the practice of union representatives in administering the clause.

The phrase "be liable for these employees wages, travel, Health-Walfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions" in Art. IV refers to a series of payments, including the trust contributions, for the benefit or on behalf of the subcontractor's employees. Language in the three direct benefit trust agreements describing beneficiaries as employees of signatory employers does not accomplish a limitation of beneficiaries to those employees because each trust expressly subjects its terms to those of the collective bargaining agreement. Article IV of the collective bargaining agreement calls for contributions to the trusts for the benefit or on behalf of a non-signatory subcontractor's employees.

The Oregon Supreme Court in this case read Art. IV as requiring contributions for the benefit of the subcontractor's employees. Moreover, evidence in the record indicates that the bank administrator of the trusts and union personnel read it the same way in administration of the trusts. Cases involving garment industry agreements requiring signatory employers to make liquidated damage contributions to trusts, or to make contributions equal to a percentage of payments by an employer to a non-signatory subcontractor, are not helpful in interpretation of Art. IV in this case, calling for payment of "these [the subcontractor's] employees" contributions to the trust.

Article IV is correctly read as requiring trust contributions for the benefit or on behalf of employees of non-signatory subcontractors. Its enforcement therefore violates § 302(c)(5).

B. The Vacation and Apprenticeship Trusts have purposes within those stated in § 302(c)(6), adopted by the 1959 amendment to § 302. Trusts within § 302(c)(6) are, however, subject to the beneficiary requirements of § 302(c)(5).

The intent of Congress in adopting § 302(c)(6) was merely to remove any doubt that vacation, holiday and severance pay and apprenticeship training are permissible purposes for § 302 trusts. Prior to the 1959 amendment, courts had applied the § 302(c)(5) beneficiary requirements to trusts for what became § 302(c)(6) purposes, such as severance pay. The only case on the point since the adoption of § 302(c)(6) in 1959, *In Re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973), squarely supports Petitioner's position that subsection (6) trusts are subject to the beneficiary requirements of subsection (5).

Application of § 302(c)(5) to require an apprenticeship training trust to be for the benefit of employees of contributing employers is not difficult to meet, since apprentices are employed by such employers during training or will be so employed at the conclusion of their training. If § 302(c)(6) vacation trusts were not subject to the beneficiary requirements of § 302

(c)(5), such a trust could be used to provide vacations for union officials or other non-employees of contributing employers, contrary to the intent of Congress in adopting § 302.

C. The CIAF Trust may be subject to § 302. Evidence in the record indicates that the collective bargaining agreement, union personnel and the same bank administrator enforce required contributions to this trust to the same extent as the other four trusts. The claim that the CIAF Trust is not subject to § 302 was not made by Respondents in the courts below.

D. Petitioner stands by its argument that the ruling of the Court below, under the circumstances of this case, frustrates the purposes of the Davis-Bacon Act to prevent an employer's cost obligations under a collective bargaining agreement from being a competitive disadvantage in obtaining contracts subject to that Act. Petitioner's argument on this point is properly before this Court.

ARGUMENT

A. The Subcontractors Clause (Art. IV) of the collective bargaining agreement requires contributions to the trusts on behalf of, or for the benefit of, employees of non-contributing subcontractor employers, and cannot be interpreted merely to measure contributions for the benefit of employees of contributing employers by the hours of work of the subcontractors' employees.

The chief argument of Respondents' Brief is that the Subcontractors Clause (Art. IV) of the collective bargaining agreement in this case should be interpreted merely to measure a signatory employer's contributions to the trusts by the hours of work of employees of non-contributing subcontractors, and not to require contributions for the benefit of the subcontractors' employees That argument concedes, of course, that contributions to the Health and Welfare and Pension Trusts, at least, would violate § 302(c)(5) if Art. IV requires them to be for the benefit of a non-signatory subcontractor's employees. See Brief of Respondents at 20, 27-28.

More importantly, Respondents' interpretation of the Subcontractors Clause is inconsistent with the language of the clause on its face and with the interpretation of it by the court below and in administrative practice. The precise language of the clause is (Pl. Ex. 7, A. 78):

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and *be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement*. . . ." (emphasis supplied).

The phrase "these employees wages, travel . . ." obvi-

ously refers to sums paid to an employee for his direct benefit. The immediately following words referring to trust contributions ("these employees . . . Health-Welfare, Dental, Pension, Vacation, Apprenticeship and CIAF contributions . . .") have the same connotation of payments made for the benefit or on behalf of the subcontractor's employees, just as wages and travel pay are for their benefit. It seems clear that Art. IV on its face, requires the trust contributions to be for the benefit or on behalf of the subcontractor's employees.

Moreover, the principal premise of Respondents' interpretation of Art. IV cannot be established. That premise is that the Trust Agreements describe individual beneficiaries of the trust as employees of contributing employers. Therefore, Respondents argue, it may be inferred that Art. IV of the collective bargaining agreement was not intended to require trust contributions for the benefit of employees of a non-contributing subcontractor.

The major difficulty in this premise is that Art. VIII § 1 of the Health and Welfare and Pension Trust Agreements (Pl. Ex. 4, p. 14 of pink pages and p. 14 of blue pages) expressly states that the rights of employees and beneficiaries under the Trust Agreements are "[s]ubject to the provisions of the Collective Bargaining Agreement." The same provision is found in Art. IX § 2 of the Vacation Trust Agreement (Pl. Ex. 4, p. 14 of gray pages). Thus, the terms of the Subcontractors Clause of the Carpenters Master Labor Agree-

ment on beneficiaries of trust contributions required by that clause expands the narrower definition of beneficiaries in the trust agreements.

The Oregon Supreme Court in this case clearly read Art. IV as requiring contributions to the trusts for the benefit of the subcontractor's employees:

> "In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement *he would be liable for payments into the various trust funds for the employees of such a subcontractor.*" (540 P.2d at 1015; p. 36 of Brief of Petitioner, emphasis supplied).

The record shows that the bank administrator of the trusts and the auditor appointed by the trustees, as well as union personnel, all regarded Art. IV as requiring contributions for the benefit of specific employees of the non-contributing subcontractor, in the case of at least the Health and Welfare, Pension and Vacation Trusts. The trust officer of the bank administrator for all of the trust funds in this case testified that subcontractor Jackson's non-union carpenter employees could receive benefits from the Health and Welfare and Pension Trusts if they met the eligibility requirements as to number of hours and periods of covered employment (A. 55-60). As to the Vacation Fund, he testified that employees for whom

contributions are made receive payments from the trust, as vacation pay, equal to contributions to the trust on their behalf and their prorata share of earnings of the trust, without any other eligibility requirements (A. 60):

> "Q. How about the Vacation Fund?
> A. The Vacation Fund?
> Q. What are the eligibility requirements?
> A. There is no eligibility requirement. It's whatever contributions are paid in on behalf of the man. He is entitled to those contributions, and there are earnings from the investments. Then it is prorated accordingly by the first dollar in."

The undisputed evidence is that all of the trusts accepted contributions with respect to employees of non-signatory employers if the contributions were reported and paid to the trust indirectly through a signatory employer, such as Petitioner. A. 53, 65-66. The auditor appointed by Respondents for purposes of this case prepared his findings on monthly report forms intended for use by employers in making trust fund contributions (Pl. Ex. 8, blue pages). The auditor listed for each monthly period the name of each carpenter employee of subcontractor Jackson, the hours of carpentry employment by each such employee during the month, and the name of the contributing employer as "Victor L. Jackson (Tom Walsh)." While this practice would not avoid the illegality under § 302 (c) (5) of trusts for the benefit of employees of a non-contributing employer, it signifies the belief of union and trust personnel that contributions under

Art. IV were made on behalf of particular employees of the subcontractor and, in at least the case of the three direct-benefit trusts, for the benefit of those employees.

In short, those concerned with the enforcement and administration of the trusts with respect to employees of non-signatory subcontractors assumed that contributions to the trusts under Art. IV were for the benefit or on behalf of such employees.[1]

Respondents' reliance (Br. of Resp. 29-40) on the *Greenstein, Kreindler and Budget Dress*[2] decisions is

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[1] Contrary to Respondents' argument (Brief 39-40), the Apprenticeship and CIAF Funds can (and must, if subject to § 302(c)(5)) be for the benefit of employees of contributing employers. Art. II § 2 of the Apprenticeship Trust Agreement (Pl. Ex. 4, green pages, p. 4), quoted at Br. of Resp. 53, provides that the Fund shall be used for apprenticeship "or other training programs" for the education of apprentices and journeymen and for other related purposes. Both journeymen and apprentices are employed during their training, or will be employed at the conclusion of their training, by signatory employers, and thereby qualify as employees of contributing employers and proper beneficiaries under § 302 (c) (5).

The only evidence in the record as to the use of CIAF Trust funds is the statement of purposes of the trust in Art. II § 2 of the Trust Agreement (Pl. Ex. 4, yellow pages, p. 2). The stated objects are "promoting safety, education and research and the betterment and advancement of conditions of those engaged in the construction industry within the area covered by the Collective Bargaining Agreement," and certain related purposes, "provided, however, that the Fund shall be used for the benefit of the construction industry generally."

[2] *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc.*, 178 F. Supp. 681 (S.D. N.Y. 1959); *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (S.D. NY. 1960); *Budget Dress Corp.* v. *Joint Board*, 198 F. Supp. 4 (S.D. N.Y. 1961), aff'd 299 F.2d 936 (C.A. 2, 1962), cert. den. 371 U.S. 815 (1962).

misplaced. The language of the agreements in those cases contrasts sharply with Art. IV of the Carpenters Master Labor Agreement. In *Greenstein*, the Court described the agreement as requiring a signatory employer using a non-union subcontractor to make trust fund contributions computed as a percentage of his payments to the non-union subcontractor for labor, overhead and services, plus a percentage of the signatory employer's own payroll. The contributions based on payments to non-union subcontractors were specifically described in the collective bargaining agreement as liquidated damages for breach of the obligation to subcontract only to union employers. 178 F. Supp. at 684-685.

In *Kreindler*, the Court described the collective bargaining agreement clause as requiring the signatory employer to make contributions to the trust funds in amounts based on its own payrolls and those of non-union subcontractors. 184 F. Supp. at 183. In both *Greenstein* and *Kreindler*, the employer's argument was that required contributions based on the subcontractor's payrolls were illegal because employees of the non-union subcontractors were *not* beneficiaries of the trusts. No one contended that the subcontractor clauses in those garment industry agreements required contributions for the benefit of the non-union subcontractor's employees, unlike Art. IV in this case.

Budget Dress involved a clause similar to those in *Greenstein* and *Kreindler*. The employer in *Budget*

Dress, however, made the same arguments of § 302 invalidity that Petitioner makes here. The Court easily rejected the argument in *Budget Dress* because the subcontractor clause there, unlike Art. IV in this case, did not require trust contributions for the benefit of the non-union subcontractor's employees. Instead, the clause in *Budget Dress* required a signatory employer to make trust contributions for the benefit of employees of contributing employers, based on a percentage of payroll of or payments to a non-signatory subcontractor. Such language is obviously quite different from Art. IV here, which requires a signatory employer to be liable for and pay "these [the subcontractor's] employees . . . Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement."

Respondents point out (Br. of Resp. 40-49) that health and welfare and pension plans are often based on actuarial assumptions that many employees for whom contributions are made to the trusts will never qualify for benefits from the trusts. Payments to the trusts for such eventually non-qualifying employees thereby add to the benefits available from the trusts to those employees who do qualify. Thus, Respondents argue, the contributions required by Art. IV for employees of a subcontractor may have been intended to enhance benefits available to legal beneficiaries who are employees of contributing employers.

While Respondents' statements concerning actuarial assumptions in such benefit plans may be accu-

rate, there is no evidence in the record here as to what actuarial assumptions were made in establishing the Health and Welfare and Pension Trusts involved in this case. Moreover, the pension plan texts cited by Respondents (Br. of Resp. 43, fn. 14) do not mention any instance in which a trust was based on actuarial assumptions of a certain level of penalty, liquidated damages or other employer contributions not involving hours and periods of work by employees of contributing employers.

Petitioner submits that the Subcontractors Clause in the Carpenters Master Labor Agreement can only be interpreted as requiring trust contributions for the benefit or on behalf of employees of non-signatory subcontractors, which employees are not proper beneficiaries under § 302(c)(5). Art. IV thus requires illegal contributions, in violation of § 302(a), to at least the Health and Welfare and Pension Trusts. The language of Art. IV is not simply an "inartful" shorthand (Br. of Resp. 39) meaning that a subcontractor's payroll is only a measure of contributions to be made by a signatory employer for the benefit of employees of contributing employers.

B. The Vacation and Apprenticeship Trusts are also subject to the beneficiary requirements of § 302(c)(5), and the contributions required by Art. IV to those trusts are also illegal.

Respondents argue (Br. of Resp. 50-54) that the Vacation and Apprenticeship Trusts are created for

purposes within § 302(c)(6), and not subject to the beneficiary limitations of § 302(c)(5).

The only case ruling on the point rejects Respondents' argument, and holds that the beneficiary limitations of § 302(c)(5) apply to trusts whose subject matter falls within § 302(c)(6). *In Re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194, 196 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973).

As the courts in that case and in *Blassie* v. *Kroger Co.*, 345 F.2d 58, 74 (C.A. 8, 1965), correctly point out, the only purpose of Congress in adding subsection (6) to § 302(c) in 1959 was to remove any doubt that trusts for purposes of vacation holiday and severance pay and for purposes of apprenticeship and training programs are within the exemptions of § 302(c) from the prohibition of § 302(a). See House Report No. 741, 2 U.S. Code Cong. & Ad. News, 1959, at pp. 2445-2446, 2469-2470.

In pre-1959 agreements, courts had applied the § 302(c)(5) limitations to trusts having a purpose, such as severance pay, among those listed in § 302(c)(6) when adopted in 1959. An example is *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc., supra*, involving application of § 302(c)(5) to a severance pay trust, among others. There is no evidence that Congress intended in the 1959 amendments to eliminate the § 302(c)(5) requirements which courts had already held applicable to a trust described in § 302(c)(6). Instead, Congress was simply clarifying the per-

missible purposes for trusts to which payments are exempted by § 302(c).

As this Court noted in *Connell Construction Co.* v. *Plumbers etc. Union*, 421 U.S. 616 (1975), Congress does not always explicitly say what it means in statutory language. There, the "hot cargo" exemption of § 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) was held to apply only to certain collective bargaining agreements, even though Congress did not expressly state that limitation in the statute. 421 U.S. at 628-635. The same situation is present in § 302(c)(6), which was intended to incorporate the limitations of § 302(c)(5) in trusts whose purposes might not be within those stated in that subsection.

Respondents contend (Br. of Resp. 53-54) that imposition of the beneficiary requirements of § 302(c)(5) would make it impossible to create valid apprenticeship and training trusts, "since it is not their purpose to benefit the contributing employer's employees." As noted earlier in footnote 1 to this Reply Brief, Respondents' premises are incorrect. Both apprentices and journeymen are employed during their training programs, or will be employed at the conclusion of them, by contributing employers. Thus, a trust for the purpose of training apprentices and journeymen meets the requirement of § 302(c)(5) that it be established solely for the benefit of employees of contributing employers.

Moreover, Respondents' argument proves too much. If a trust to provide vacation pay is not subject

to the § 302(c)(5) requirement of benefiting employees of contributing employers, there would be no legal restriction on who could benefit from the accumulated vacation trust funds. Such a trust might then be used to provide vacations for union officials, a purpose clearly in conflict with the intent of Congress in adopting § 302 to prohibit bribery and other payments which might be improperly diverted by union officials.

Finally, we note that the Oregon Supreme Court found no distinction between § 302(c)(5) trust purposes and § 302(c)(6) purposes in holding that Art. IV did not violate the beneficiary requirements of § 302(c)(5). It assumed, as the court held in *In Re Typo-Publishers Outside Tape Fund, supra*, that the beneficiary requirements of § 302(c)(5) apply to trusts having purposes within either that subsection or subsection (6).

C. The CIAF Trust may be subject to § 302.

Respondents argue (Br. of Resp. 55-57) that the record shows no basis for a claim that the CIAF Trust is subject to § 302. The question is not very important, in any event, because Art. IV of the collective bargaining agreement and the other four trusts clearly raise the § 302 issue on which Petitioner sought certiorari, and the contributions awarded to the CIAF Trust are miniscule (A. 18, decree as to Case No. 389-038).

We leave to the Court the proper interpretation of the testimony quoted in Br. of Resp. 56-57. In Petitioner's view, it can be taken to mean that the trustor

has appointed some union trustees for the CIAF Trust. Other factual circumstances indicate that the Carpenters Union has clearly taken an interest in an ostensibly employer-controlled trust. Contributions to the CIAF Trust are required by Art. IV. of the collective bargaining agreement, at least where non-union subcontractors are engaged by a signatory employer. All five trusts have the same bank administrator (A. 54), and contributions for all five funds are computed and reported by a signatory employer on a single form (Pl. Ex. 8, blue pages). The same attorneys represent the trustees of all five funds in these consolidated cases, and all five of the cases were commenced simultaneously (A. 1).

On the record of this case, it is difficult to conclude that the CIAF Trust Fund is not within § 302 solely because the trust agreement vests an employer association with authority to appoint the trustees. The courts below did not draw any distinction between the trusts in deciding the § 302 question, and Respondents did not urge below the inapplicability of § 302 to the CIAF Trust.

D. The impact of the holding of the Court below on Davis-Bacon Act purposes is a proper consideration in interpretation of Art. IV of the collective bargaining agreement and § 302(c).

Respondent argues (Br. of Resp. 57-64) that Petitioner has not properly presented to this Court a Davis-Bacon Act issue. Petitioner did not claim in its Petition for Certiorari or in its Brief on the merits

that the holding below violates the Davis-Bacon Act, 40 U.S.C. § 276a. Instead, Petitioner made an accurate argument that § 302(c), as applied by the holding of the Oregon Supreme Court to sustain enforcement of Art. IV of the collective bargaining agreement, under the circumstances of this case, "frustrates the purpose of the Davis-Bacon Act" by making it more expensive for a union contractor to use a non-union subcontractor than a union subcontractor, and not just equally expensive.

The impact of the requirements of the Davis-Bacon Act in this case was a common subject in the trial court proceedings. Petitioner testified at the trial to his belief that union officials unfairly failed to give him notice of their intent to require contributions to the trusts with respect to subcontractor Jackson's employees, even though Jackson was complying with the Davis-Bacon Act by paying the fringe amounts directly to his employees as additional compensation (A. 26-27, 28, 31-32, 70-72).

Petitioner stands by the argument in his opening brief, pp. 19-21, that the impact of the application of § 302(c) by the Oregon Supreme Court decision in this case is to frustrate the purposes of the Davis-Bacon Act to avoid competitive disadvantage from an employer being bound by a collective bargaining agreement with a union.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed, with directions to enter a judgment dismissing Respondents' claims against Petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-906

THOMAS J. WALSH, JR., d/b/a TOM WALSH & CO.,
Petitioner,

v.

E. A. SCHLECHT, *et al.*, as TRUSTEE OF FIVE OREGON-WASHINGTON CARPENTERS-EMPLOYERS TRUST FUNDS,
Respondents.

On Writ of Certiorari to the Supreme Court of Oregon

MEMORANDUM OF HUICO, INC. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE [1]

Huico, Inc. is engaged in prefabrication of pipefitting equipment for use in heavy industrial construction such as power plants, refineries and large pipeline construction including the Trans-Alaskan Pipeline

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[1] Both parties to this cause have consented, in writing, to the filing of this Memorandum. Pursuant to Supreme Court Rule 42, copies of those consents have been lodged with the Clerk.

Project. It employs approximately two hundred persons and, pursuant to appropriate written union collective bargaining agreements, contributes into certain fringe benefits trusts for its unionized employees. These independent trusts were originally negotiated by the unions and the predecessor of Mechanical Contractor Associations of Washington ("MCA")—a multiemployer bargaining association. The trusts expressly provide for participation therein by employers having union agreements, irrespective of whether such employers are members of MCA. Huico, Inc. is not a member of MCA.

MCA has filed a brief, *amicus curiae*, in this cause, urging as an alternative basis for decision, not urged or considered below, that participation in fringe benefit trusts by nonmembers of the employer associations which originally negotiated creation of the trusts is unlawful under Section 302 (c)(5)(B) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(5)(B).

Huico's interest in this matter is confined to addressing this alternative basis for decision advanced by MCA, because MCA is presently pressing an action against Huico in the United States District Court for the Western District of Washington on precisely the same theory it urges here as *amicus*.[2]

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[2] *Mechanical Contractors Associations of Washington* v. *Huico, Inc., et al.*, Cause No. C 75-667S, pending on cross motions for partial summary judgment before the Honorable Morrell Sharpe. MCA has failed to apprise this Court in its *amicus* brief of the pendency of that action in District Court. It has not advised Huico of its *amicus* participation in this case. Nor, to the best of our knowledge, has it called its participation in this case to the attention of the District Court in which it is advancing the same theory as a plaintiff.

In essence, it is Huico's position that this Court should not consider the alternative basis urged by MCA herein. The MCA argument raises questions of judicial first impression which were neither raised nor considered below. The record in this action is plainly insufficient to consider questions of such widespread impact. It would be offensive to the orderly administration of justice to permit MCA, in this unique manner, to "leapfrog" both the development of a full record and decision of the District Court.

ARGUMENT

1. Introduction

This Court granted certiorari to consider the legality under Section 302 of the Labor Management Relations Act, of a general contractor's agreement with a union to assume liability for fringe benefit payments into trust funds for employees of nonunion firms to which it subcontracted work—i.e., for non-employees of the contributing employer. That issue was fully briefed by both parties and decided by the Supreme Court of Oregon.

MCA, as *amicus curiae,* urges an alternative basis for decision—that under Section 302, an employer cannot make contributions for its own employees into fringe benefit trusts absent its membership in the employer association that originally negotiated creation of the trusts, irrespective of the fact that the terms of the trust expressly provide for participation by nonmembers, and notwithstanding written agreements with the unions requiring that such payments be made.

That question was never raised by any party to this proceeding, nor even remotely considered by the courts below because, simply put, it is not pertinent to this case.

2. The Orderly Administration of Justice Requires that Decisions of This Court Be Predicated Upon an Adequate Record

It is a settled maxim that this Court will not decide important issues upon an inadequate record. *McCarthy* v. *Bruner,* 323 U.S. 673 (1944). MCA's argument falls within application of that rule.

For instance, in the subject case, the issues and contracts relate to legality of fringe benefit payments being made for non-employees of the contributor. The issue of *MCA* v. *Huico,* pending below and addressed by the *amicus* here, however, deals with fringe benefit payments for unionized employees of the contributor, pursuant to union contracts requiring such payments, and pursuant to trust instruments expressly providing for receipt of payments from these employers. Of course, neither these contracts nor trusts are before the Court; nor are the trusts in the subject case contained in the Appendix to enable comparison by the *amici.*

Equally significant, the Court should avoid consideration of the contentions advanced by MCA, without the benefit of full briefing by appropriate parties and decisions of the District Court and Court of Appeals. For Section 302 of the Act, and in particular, its "equal representation" and "written agreement" requirements, are the product of extensive legislative history which commands due analysis. That analysis

has been extensively briefed to the District Court in *MCA* v. *Huico,* and will assumedly be addressed by that Court. Obviously, the unilateral assessment thereof by MCA as *amicus* herein, is an inappropriate source of reliance by this Court.

Moreover, consideration of the alternative basis for decision advanced by MCA would enable it to avoid consideration of the inherent vice contained therein—that of a proscribed antitrust tying arrangement inherent in conditioning access to independent trusts upon membership in an employer association. Equally susceptible of avoidance by MCA would be the issue of assuming *arguendo* the propriety of its contentions, what the appropriate remedy should be. If, for instance, as urged by MCA, every trust contributor must participate in selecting trustees, rather than being able to adopt representation by the existing trustees, should their right to make continued employee contributions be banned, with consequent possible loss of benefits to employees? Or, to avoid forfeiture, should equity order modification of the trust to enable compliance with the trustee selection requirements of the Statute as construed by the Court?

Further, the record in the subject case does not apprise the Court of the widespread accepted practice in the construction industry of structuring employee fringe benefit trusts to accept contributions from employers of union members—in order to assure continued benefits to such transient workers—irrespective of the status of the contributing employer as a member of a local employer association. There are, for instance, numerous construction companies who operate nationally and exclusively employ local union

members wherever projects arise. They contribute into local trust funds for the benefit of their union workmen. To hold that such employers must be members of all local associations would seriously impede interstate commerce, by forcing employers to join numerous employer bargaining associations for every craft in every locality they operate. Alternatively, such employers would be forced to establish competing national trust funds. Mandatory membership in local employer bargaining associations is not a goal of national labor policy.[3] Similarly, establishment of duplicative industry trust funds was not contemplated by Congress as an intended result of Section 302.

Most significantly, the position urged by MCA could well cause total and perhaps catastrophic loss to employees who may find themselves suddenly without benefits, notwithstanding years of contributions having been made upon their behalf. See *Moglia* v. *Geoghegan*, 403 F.2d 110 (C.A. 2, 1968), *cert. den.* 394 U.S. 919. The gravity of these consequences, it must be emphasized, require consideration only in orderly evolution of an appropriate record and not in derogation of the processes of the District Court.

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[3] Moreover, given the requirement of numerous local associations that its members be bound to its local collective bargaining agreement, to the exclusion of independently arrived at union agreements, endorsement of MCA's contention would play havoc with established bargaining relationships.

CONCLUSION

For the foregoing reasons, the Court is urged to decide this case on the basis of the principles argued before, and decided by. the courts below and not upon the alternative basis urged by MCA as *amicus curiae*.

Respectfully submitted:

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Respondents.

BRIEF OF *AMICUS CURIAE*
MECHANICAL CONTRACTOR ASSOCIATIONS OF WASHINGTON

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BRIEF OF *AMICUS CURIAE* MECHANICAL CONTRACTOR ASSOCIATIONS OF WASHINGTON

I. THE INTEREST OF AMICUS

Amicus Curiae, Mechanical Contractor Associations of Washington (hereinafter referred to as "MCA") is a Washington non-profit organization. Its membership is comprised of substantially all unionized mechanical contractors located in Washington and parts of Oregon and Idaho, i.e., its members employ members of various plumbing and pipefitting local unions. One of its primary functions is that of multi-employer collective bargaining on behalf of

its members. It enters into labor-management agreements with various plumbing and pipefitting local unions existing in the geographic areas involved. Part and parcel of the collective bargaining process and the agreements which result are certain, jointly-administered employee benefit trusts of the type being considered by this honorable court; these trusts are commonly referred to in the industry as "302 trusts".

The specific interest of MCA is a practice in the construction industry pertaining to "302 trusts" which exists virtually throughout the country. Specifically, a construction employer association such as MCA and a labor union negotiate a labor agreement. As a part of the negotiations, they create and from time to time agree to alter, modify or amend, a written, jointly-administered employee-benefit trust agreement. The employer association selects trustees and the union selects a like number to administer the trusts. The problem comes in acceptance by the trustees of funds contributed by employers who are not members of the employer association nor represented by the employer association. It is MCA's position that that practice violates both requirements of §302(c)(5)(B) of the Labor-Management Relations Act of 1947, 29 USCA §186 which state:

> "The detailed basis on which such payments are to be made is specified in a written agreement with the employer and employees and employers are equally represented in the administration of such fund . . ."

The unions traditionally attempt to satisfy this requirement by entering an agreement with the non-member employer whereby that non-member agrees with the union to be bound by the terms of the employer association-

union agreement which agreement provides, *inter alia*, for the making of trust contributions.

In recent years the advent of what is called a National Construction Agreement has grossly perpetuated this practice. Under the terms of such an agreement a large national contractor will enter an agreement with an international union for a given craft. The gist of the agreement is that the national contractor agrees to be bound by the terms of the collective bargaining agreement which is in effect in the geographic area where he might be performing a construction project. When he enters a given area the local union will then have the national contractor sign a compliance agreement.

If this precise issue was before the court for consideration, we would frame the issue as follows:

Where a multi-employer bargaining association enters a labor-management agreement on behalf of its members with a union which includes provisions for a jointly administered employee benefit trust, may a non-member of that association lawfully make contributions to that trust without the consent of the association?

II. SUMMARY OF PERTINENT FACTS AS REVIEWED BY THIS AMICUS

The parties to the subject trusts are the Oregon-Columbia Chapter of the Associated General Contractors of America, et al., and certain local unions of the United Brotherhood of Carpenters and Joiners of America. Petitioner Walsh is not a member of AGC nor is it represented by them for collective bargaining purposes. It is signatory to a 1969 memorandum agreement (Ex. 1) which requires

compliance with the applicable collective bargaining agreement and the subject trusts (Ex. 4), but it is not a party to them. The management trustees on the subject trusts are selected by AGC and as a non-member Walsh has no voice in their selection.

On the basis of these facts and for the reasons discussed below, Amicus urges the court to rule that any payment made by Walsh to the subject trusts would be unlawful and therefore cannot be compelled.

III. THE HISTORY AND NATURE OF §302

Congress included in the Labor-Management Relations Act of 1947 broad prohibitions against payments by employers to representatives of their employees. Section 302(a) of the Act provides, in relevant part,

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultants to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other things of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

29 U.S.C. § 186(a).

The blanket proscription upon payments has been considered on several occasions by the Supreme Court. In *Arroyo v. United States*, 359 U.S. 419, 3 L.Ed.2d 915, 79 S. Ct. 864 (1959), for example, the following discussion is found:

> The examination of the legislative history confirms that a literal construction of this statute does no violence to common sense. When Congress enacted § 302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.
>
> Throughout debates in the Seventy-ninth and Eightieth Congresses there was not the slightest indication that § 302 was intended to duplicate state criminal laws. *Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem* because of the demand which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employer's contributions and administered exclusively by union officers. See United States v. Ryan, 350 U.S. 299, 100 L.ed. 335, 76 S.Ct. 400.
>
> Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong.Rec. 4892-4894, 4899, 5181, 5345-5346; S.Rep. No. 105, 80th Cong. 1st Sess., at 52; 93 Cong.Rec. 4678, 4746-4747. To remove these dangers, *specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were*

established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv.L.Rev. 274, 290. Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e).

3 L.Ed.2d at 919-920 (Emphasis supplied, footnotes omitted.

Congress provided limited exceptions to the reach of § 302(a) in § 302(c) of the Act. That section provides:

> The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical and hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) *the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund,* together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable

> length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or other benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of this subsection shall apply to such trust funds; . . . .

29 U.S.C. § 186(c) (Emphasis supplied).

A violation of the quoted provision is a crime (29 U.S.C. § 186(d)). The purpose of the statute is to curb abuses, both actual and potential, The legislative history of this section makes clear that Congress believed that absent a *limited* exception for such funds and absent specific guidelines for their administration, a substantial danger existed that such funds might be employed to perpetrate control of union officers, for political purposes, or even for personal gain. As such, the specific section under consideration here is strictly and narrowly construed. *U.S. v. Ryan,* 350 U.S. 299, 76 S.Ct. 400, 100 L.Ed. 335; *Local No. 2 v. Paramount Plastering,* 310 F.2d 178 (9th Cir. 1962); *Mech. Const. Assn. of Philadelphia v. Local Union 420,* 265 F.2d 607 (3d. Cir. 1959).

In *Independent Assn. of Mutual Emp. v. New York Racing Assn.*, 398 F.2d 587 (2d Cir., 1968), the court noted that:

> The purpose of Section 302 is to prevent union and union officials from demanding that employers contribute to "welfare funds" under the control of the union which the union's officials could use as they saw fit. Arroyo v. United States, 359 U.S. 419, 425-426, 79 S.Ct. 864, 3 L.Ed.2d 915 (1959); United States v. Ryan, 225 F.2d 417 at 423-424, 425-426; 350 U.S. at 304-306, 76 S.Ct. 400. What Congress wished to accomplish by enacting Section 302 was to give the employer an equal voice with the union in the administration of union-established welfare funds.

398 F.2d at 591.

IV. LACK OF EQUAL REPRESENTATION

It is the position of this Amicus that the acceptance of contributions by the trustees form non-association members such as Walsh violates that portion of 29 U.S.C. § 186(c)(5)(B) which states, "Provided: . . . employees and employers are equally represented in the administration of such fund."

Non-AGC member contributors have no voice in the selection of trustees, in determining the terms and conditions of the trust agreement, or in the collective bargaining agreement which creates it. The management trustees are all appointed by AGC. Walsh not being an AGC member and having no voice in their selection cannot be said to be represented by them. Walsh is liable for contributions to these supposedly jointly administered trusts only because of an agreement he made with the unions. Thus, Walsh is not represented by anyone other than the labor trustees. Walsh's contributions are being made to representatives

of its employees, i.e., labor trustees, and the trust is being administered in violation of law.

A very recent case involving this same representation issue is *Mobile Mechanical Contractors Assn. v. Carlough*, 382 F. Supp. 1134 (1974). In that case, the union struck because of the multi-employer bargaining unit's refusal to agree to pay money to the National Stabilization Agreement of the Sheet Metal Industry Trust Fund (SASMI). The issue raised was whether SASMI was properly established, administered and maintained under the requirements of 29 U.S.C. § 186. The court found:

> The evidence is overwhelming that SASMI does not comply with the requirements of Section 302 that "employers and employees . . . [be] equally represented in the administration of such fund."
>
> It is abundantly clear from the Agreement and Declaration of Trust Establishing The National Stabilization Agreement Of Sheet Metal Industry Trust Fund (1973 Trust Agreement) and the testimony of defendants' expert witness that the General President of the Sheet Metal Workers International Association (International Association), a position now occupied by Defendant Carlough, has the continuing unfettered right to remove and replace any or all union trustees and that no employer has any right to participate in removal or replacement or as a matter of practice the appointment of employer trustees. It is uncontroverted that Mechanical Contractors has neither the right to select nor to remove nor to replace nor the right to participate in the selection, removal or replacement of any employer trustee.
>
> . . .
>
> Thus, no employer, except employers who participated in the initial establishment of SASMI, may participate in the selection of any employer trustee; by

contract, the International Association retains such a right to remove and select union trustees from time to time.

. . .

This court views with some surprise the fact that SASMI has been established, administered, and maintained with so little regard for the purposes of Section 302. As the Supreme Court emphasized in United States v. Arroyo, 359 U.S. 419, 79 S.Ct. 864, 3 L.ed.2d 915 (1959),

> Those members of Congress who supported the amendment were concerned with the corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem . . . (foot-notes omitted) 359 U.S. at 425-426, 79 S.Ct. at 868.
>
> The disproportionate representation on the part of the International Association as compared to that of the employers in general and Mechanical Contractors in particular raises a very real possibility of union domination of SASMI by the International Association.

382 F.Supp. at 1136-1137.

This record is void of how disproportionate the representation is but that makes no difference. The fact remains that Walsh has no voice in selection of the employer trustee; that function is carried out by AGC and its membership and as a non-member Walsh does not participate in that process. Therefore, the employers and employees are not equally represented in the trust's administration.

To analogize, lets say that two employers and a union formed a trust. The two employers were to serve as trustees

and retained the right to appoint successor trustees, if any. The union then got ten other employers to agree to be bound to the trust. These ten new employers, although operating in the same industry, had no other connection with the original two employers. Clearly, the employers and employees cannot be said to be represented equally. The ten new employers, if represented at all, would have to be represented by the union trustees.

The only response to this argument would be to state that because there are an equal number of employer and management trustees, the employers and employees are equally represented in the administration of the trust. If that had been the congressional intent it could have easily been so stated. Additionally, to state that equal numbers means equal representation is a *non sequitur*. Indeed, that is the situation with respect to Walsh. This analogy may seem remote, but is in fact very similar to the situation ruled violative of the act in *Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster Co., Inc.* 512 F.2d 1017 (5th Cir. 1975).

On the basis of the holding of the SASMI case, if Walsh were struck by a local union it could come into court and obtain an injunction against the strike; provided the strike had as its purpose requiring contributions to the subject trusts. Basing its cause of action on the SASMI holding, it would contend that it had no voice in the selection of the trustees and therefore the unions could not compel its contributions; on the basis of that case an injunction would issue.

The SASMI court also pointed out that the failure of the mechanical contractor to have a voice in the selection of the trustees created a "very real possibility of union domination of SASMI by the International Association."

Most employer associations charge their members dues. By convincing trustees that they should be allowed to contribute, non-association members are able to get all the benefits of an association (AGC) monitoring and jointly administrating the trust, without having to pay dues (in most instances, based on the number of man-hours worked) as an association's members must.

The primary authority relied upon by the SASMI court was *Quad City Builders Assn. v. Tri-City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970). The court in that case also found that the equal representation requirements of the Act had been violated. The union and the Bricklayers Association entered into an agreement whereby the association, on behalf of its employers, agreed to make contributions to a mutually agreeable trust. The trust the union insisted upon was a trust between itself and the Mason Association. The building assiciation had no voice in the selection of trustees, but the number of management and labor trustees was equal. The Court of Appeals upheld the trial court's ruling that the trust failed to meet the equal representation requirements of the Act. It stated:

> The trust fund here involved is created by a written instrument and provides benefits for employees permitted by the statute. The issue in controversy is whether employers and employees are equally represented by trustees in the administration of the fund. The Act, as shown by the portions thereof hereinabove quoted, specifically requires equal representation in the administration of the trust fund on the part of employers and employees. In Arroyo v. United States, 359 U.S. 419, 426 79 S.Ct. 864, 868, 3 L.Ed.2d 915, the Court observes that Congress in enacting the legislation here pertinent was concerned "with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."

In Blassie v. Kroger Co., 345 F.2d 58, 72 (8th Cir. 1965) we held *"to permit the union in any degree to participate in the choice of employer representatives does violence to the statutory standard of equal representation."*

The court in Employing Plasterers' Ass'n v. Journeymen, etc., 279 F.2d 92, 97 (7th Cir. 1960) holds that "§ 302 is aimed at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated."

On the equal representation issue, Judge Stephenson found:

> Considering all the facts of this case, the Court is compelled to hold that this Trust Fund fails to meet the equal representation requirement of § 302 (c)(5)(B), 29 U.S.C.A. § 186(c)(5)(B). Under the present circumstances Union domination of the Trust Fund is a very real possibility. Inherent in such domination is the possibility of abuse which § 302 was enacted to prevent. The statutory standard of equal representation under § 302 is a requirement placed upon the parties by law, and to permit the Union 'in any degree' to participate in the choice of employer representatives violates this specific standard. Local No. 688, International Brotherhood of Teamsters v. Townsend, 345 F.2d 77, 79 (8th Cir. 1965); Blassie v. Kroger Co., 345 F.2d 58, 72 (8th Cir. 1965)." 302 F.Supp. 1031, 1035.
>
> Such finding is supported by substantial evidence.

431 F.2d at 1003 (Emphasis supplied).

Do the local unions in this case, "in any degree participate in the choice of employer (Walsh) representatives?" We submit the answer is "yes" with respect either to Walsh or to contributors who do not belong to or are not represented by an employer association which selects the trustees. When the union enters into a collective bargaining agreement with a non-association member requiring trust

contributions they are thereby imposing on the non-member contractor those trustees selected by the employer association and the unions. In essence, they are deciding for the non-member who that non-member's representative on the trust will be. They are not only participating in the non-member's choice, they are in fact dictating it. 29 U.S.C. § 186 "is aimed at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated."

This court should rule as a matter of law that employers and employees are not equally represented where an employer contributor is precluded from participating in the selection process of management trustees. Walsh because of his nonmembership in AGC could not and did not.

V. NECESSITY OF A WRITTEN AGREEMENT

Proviso (B) to 29 U.S.C.A. § 186(c)(5) provides, in pertinent part, that payments to an employee trust fund are lawful only if, "the *detailed basis* on which such payments are to be made is specified in a *written agreement with the employer.*" (Emphasis added).

We note that where the statute speaks of the "detailed basis", it means exactly that. If the statutory standard of specificity is not met in a particular agreement, the acceptance of payments to a trust required thereby is unlawful. *Bey v. Muldoon,* 223 F.Supp. 489, 498 (E.D. Pa. 1963).

Furthermore, mere payment in accordance with the terms of an existing collective bargaining agreement or trust fund agreement to which the contributor is not a party does not satisfy the requirements of the statute. *Carpenter's Local No. 529 v. Bracey Dev. Co.,* 321 F.Supp. 869, 875 (D. Ark. 1971).

We have found no case which interprets or defines the words, "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." At the very least Congress must have had in mind the trust agreements themselves. Neither the petitioner or the petitioner's non-union subcontractor (Jackson) is party to those trust agreements. The parties are the local AGC chapter and the local unions. The trust agreements were arrived at and continue to be modified and amended through the course of negotiation; negotiations to which neither Walsh, by virtue of his non-AGC status, nor Jackson, by virtue of his non-union status, is party or privy.

Does the fact that an employer or employer association is party to a written agreement mean that any other employer, having no connection with the employer or employer association party to the agreement, can contribute to the trust created by the agreement? We submit that the answer is "no" and that the clear meaning of the statute is that no employer can contribute unless he is *in fact* a party to the agreement. Absent such a conclusion there would be nothing preventing a carpentry contractor doing business in Florida from contributing to the subject trusts or an employer in a wholly unrelated business from doing the same thing, except perhaps if the union trustee refused to accept the contributions. That exception, as pointed out above, is exactly what the statute is designed to prevent, namely, union control and domination of the trusts.

The trust agreements create certain duties and responsibilities for each employer. Any employer contributor who is not an actual party thereto is not therefore bound thereby, even if he has entered some side agreement with the union whereby he agrees to contribute to the various trusts.

In the leading case of *Moglia v. Geoghagan*, 403 F.2d 110 (2d Cir. 1968), cert. den., 89 S.Ct. 1193 (1969), an employer had contributed to certain trust funds on his employees' behalf for some twenty-eight years. The employer had never, however, executed either the collective bargaining agreement or the trust agreement requiring the payments. The court held that the trust had accepted the employer's contributions unlawfully, saying:

> Under Section 302, *any* payment made by an employer to an employee representative, and this includes trustees administering a pension trust fund, See e.g., United States v. Ryan, 350 U.S. 299, 76 S.Ct. 400, 100 L.Ed. 335 (1956); Workers International Ass'n., 248 F.2d 307 (9 Cir. 1957), cert. denied, 355 U.S. 924, 78 S.Ct. 367, 2 L.Ed.2d 354 (1958), contra, United Marine Division, I.L.A., Local 333 v. Essex Transportation Co., 216 F.2d 410 (3 Cir. 1954), and the receipt of such payments by an employee representative are absolutely forbidden unless there is a written agreement between the employer and the union specifying the basis upon which the payments are made. Thus, *in the case of a legally established union pension trust fund, the only employer contributions which may be accepted by the trustees administering the fund are those contributions from employers who have a written agreement with the union as required by sub-section 302(c)(5)(B). Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund. Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust.* Rittenburg v. Lewis, 238 F.Supp. 506 (E.D. Tenn. 1965); Bolgar v. Lewis, 238 F.Supp. 595 (W.D. Pa. 1970).

403 F.2d at 116 (Emphasis supplied).

By virtue of a "sub-contracting" clause, petitioner has been required to make trust contributions on behalf of employees not in his employ. We submit that the statute requires that the employer of the employees on whose behalf the contributions are made must be a party to a written agreement and that neither petitioner nor petitioner's subcontractor was so bound. Contributions made by employers who merely agree to be bound by the terms of a given trust agreement are violative of the intent of the statute.

The undisputed legislative intent in passing the statute was to curb union domination and abuses vis-a-vis employee-benefit trusts. That intent is subverted by permitting contributions from employers who are not *party* to the written agreement which sets forth "the detailed basis on which such payments are to be made" even though that employer may agree to be bound to the agreement. For example, a union and an employer may make an agreement creating a "302 trust". The union then enters separate agreements with other contractors who agree to be bound to the terms of the "302 trust" agreement. In the event of union abuses arising from the structure of the trust those other employer contributors would be virtually powerless to correct same. Why? Because they are not parties to the agreement—they have no power to negotiate modifications or amendments. Instead, they must rely on the employer who actually entered the "written agreement" and that employer may be powerless or unwilling to do anything about the abuses. In short, the statute does not envision contributions made on behalf of employees or employers who are participants in the agreement but not actually parties to it. In *Bricklayers, supra,* both the employer and the union who created the trust were guilty of abuses. They are trying to

bind non-creators of the trust to make contributions relying on the fact that the collective bargaining agreement required contributions.

> The design of Section 302 discloses two basic congressional concerns. First, Congress intended to subject to close regulation the administration of union funds providing employee fringe benefits such as pensions and health and welfare payments. Congress wished to remove these funds from the absolute control of union officials by giving employers a co-ordinate responsibility for their administration. Second, Congress intended to prohibit special payments by employers and employer associations to employees, employee organizations, except on conditions carefully prescribed by law. One of these exceptions to that general prohibition permits employers to make payments to a trust fund established for the sole and exclusive benefit of the employees and families, for the purpose of paying for medical or hospital care, pensions, compensation for employment-related injuries and illnesses, unemployment benefits or life insurance, disability and sickness insurance, or accident insurance. The requirements that must be met in establishing a valid Taft-Hartley trust are prescribed in Sections 302(c)(5)(B) and 302 (c)(5)(C).
>
> Section 302(c) is a narrow exception to the general prohibition of employer-employee payments contained in Sections 302(a) and 302(b). Strict compliance with the terms of Section 302(c) is required to settle a qualifying Taft-Hartley trust. As Judge Waterman said in Moglia v. Geoghegan, 2 Cir. 1968, 403 F.2d 110, 115:
>
> "[a] reading of the legislative history of Section 302 shows that Congress intended to prohibit the establishment of any union funds by means of employer payments unless the funds conformed *in all respects* with the specific dictates of Section 302(c)".
>
> . . .
>
> Judicial adherence to the intention of Congress in enacting Section 302 requires strict enforcement of the purposefully rigid structure provided in this section.
>
> 512 F.2d at 1024, 1026.

We would, therefore, urge this court to hold that unless the employer of the employees on whose behalf trust contributions are made is an actual party to the written agreement specifying the detailed basis on which such payments are to be made those contributions are unlawful. Merely agreeing to be bound to the written agreement is not sufficient to satisfy the statutory requirement.

VI. CONCLUSION

Although the primary focus of the court below was the legality of a subcontracting clause, we submit there is a more fundamental and important issue underlying this controversy. That is the legality of contributions made by an employer to a "302 trust" situated as is Walsh.

We urge this court that not only do the trusts have no power to compel contributions from Walsh but any contribution, if made by Walsh, would be illegal. Walsh, if represented at all in the administration of these trusts, is represented by the union trustees and is definitely not a party to the written agreement specifying the detailed basis on which the payments are to be made.

Respectfully submitted,

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